Supreme Court, U.S.
FILED

081437 MAY 18 2009

OFFICE OF THE CLERK

No. __

IN THE
Supreme Court of the United States

TIMOTHY J. RUSSELL AND ANITA L. RUSSELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

AARON M. PANNER
Counsel of Record
MICHAEL J. BURSTEIN
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

May 18, 2009

QUESTION PRESENTED

Whether the court of appeals – in conflict with the decisions of at least two other circuits – erred in holding that 26 U.S.C. § 7425(b)(1) "occup[ied] the field" concerning the discharge of federal tax liens, thereby displacing post-sale procedures under state law for curing notice defects in nonjudicial foreclosure sales.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 6

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE NINTH AND ELEVENTH CIRCUITS THAT ALLOW POST-SALE DISCHARGE OF FEDERAL TAX LIENS PURSUANT TO STATE LAW 7

A. The Ninth and Eleventh Circuits Narrowly Construe the Scope of Displacement of State Law 8

B. The Tenth Circuit in This Case Held That § 7425 "Occupies the Field" with Respect to Discharge of Federal Tax Liens 12

II. THE FEDERAL TAX LIEN ACT DOES NOT DISPLACE STATE POST-SALE REMEDIES FOR DEFECTIVE NOTICE IN NONJUDICIAL FORECLOSURE SALES 16

A. This Court Presumptively Adopts State Law As the Rule of Decision Concerning the Discharge of Federal Tax Liens 16

B. Section 7425 Does Not Displace State-Created Post-Sale Remedies for Defects in Notice 18

C. The Tenth Circuit's Holding Creates an Unjustified Windfall for the Government 25

III. THE SCOPE OF DISPLACEMENT OF STATE LAW BY THE FEDERAL TAX LIEN ACT IS A QUESTION OF SIGNIFICANT NATIONAL IMPORTANCE 26

CONCLUSION 27

APPENDIX:

Opinion of the United States Court of Appeals for the Tenth Circuit, *Russell v. United States*, No. 07-1438 (Dec. 19, 2008) 1a

Judgment on the Pleadings of the United States District Court for the District of Colorado, *Russell v. United States*, Civil Action No. 07-CV-00456-RPM-BNB (Aug. 17, 2007) 14a

Minute Order of the United States District Court for the District of Colorado, *Russell v. United States*, Civil Action No. 07-CV-00456-RPM (July 10, 2007) 17a

Statutory Provisions Involved 19a

Internal Revenue Code (26 U.S.C.):

26 U.S.C. § 6323(a) 19a

26 U.S.C. § 6323(f) 19a

26 U.S.C. § 7425 ..... 22a

28 U.S.C. § 2410 ..... 26a

Colo. Rev. Stat. Ann.:

§ 38-38-501 ..... 30a

§ 38-38-506 ..... 31a

Letter from Supreme Court Clerk regarding grant of extension of time for filing a petition for a writ of certiorari (Mar. 11, 2009) 33a

Letter from Supreme Court Clerk regarding grant of extension of time for filing a petition for a writ of certiorari (Apr. 6, 2009) 34a

TABLE OF AUTHORITIES

Page

CASES

Aquilino v. United States, 363 U.S. 509 (1960) 9

Bank One, Nat'l Ass'n v. United States, No. 07-cv-00070-PSF-CBS, 2007 WL 2350101 (D. Colo. Aug. 15, 2007) 13

Bates v. Dow AgroSciences LLC, 544 U.S. 431 (2005) 19

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 7, 16

Colorado Prop. Acquisitions v. United States, 894 F.2d 1173 (10th Cir. 1990) 12

Drye v. United States, 528 U.S. 49 (1999) 17

First Am. Title Ins. Co. v. United States:

848 F.2d 969 (9th Cir. 1988) 7, 8, 9, 10, 11, 13, 15, 26

520 F.3d 1051 (9th Cir. 2008) 20

Holmes v. Securities Investor Prot. Corp., 503 U.S. 258 (1992) 21

Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991) 16, 17

McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) 21

Munaco v. United States, 522 F.3d 651 (6th Cir. 2008) 20

Security Pac. Mortgage Corp. v. Choate, 897 F.2d 1057 (10th Cir. 1990) 4-5, 12, 13, 14

Southern Bank of Lauderdale County v. IRS, 770 F.2d 1001 (11th Cir. 1985) 11, 12

Tompkins v. United States, 946 F.2d 817 (11th Cir. 1991) 7, 8, 11, 13, 15

United States v. Bess, 357 U.S. 51 (1958) 17, 21

United States v. Brosnan, 363 U.S. 237 (1960) 7, 9, 12, 16, 17, 18, 21, 26

United States v. Colorado, 872 F.2d 338 (10th Cir. 1989) 12

United States v. Craft, 535 U.S. 274 (2002)..... 17

United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 16, 17, 22, 26

United States v. Polk, 822 F.2d 871 (9th Cir. 1987).....10, 11

United States v. Standard Oil Co., 332 U.S. 301 (1947) 26

Vardanega v. IRS, 170 F.3d 1184 (9th Cir. 1999)..... 24

Vereyken v. Annie's Place, Inc., 964 F.2d 593 (6th Cir. 1992)..... 8, 12

Wells Fargo Bank, N.A. v. United States, No. 08-CV-221-AC, 2008 WL 4628382 (D. Or. Oct. 14, 2008)..... 13

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 19

STATUTES

Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125 ..... 6, 7, 17, 22, 26

Internal Revenue Code (26 U.S.C.):

§ 6321 2

§ 6322 2

§ 6323(a) 1, 2

§ 6323(f) 1, 2

§ 6325(b)(4) 20

§ 7425 ..... 1, 4, 7, 8, 9, 10, 11, 12, 13, 15, 16, 18, 19, 21

§ 7425(a)(1) 19

§ 7425(a)(2) 19

§ 7425(b) 2, 4, 12, 14, 21

§ 7425(b)(1) 2, 9, 10, 11, 19, 21, 22, 24, 25

§ 7425(b)(2) 2, 19, 23, 25

§ 7425(d) 23

§ 7425(d)(1) 5

§ 7426(a)(4) 20

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1346(a)(1) 20

28 U.S.C. § 2410 ..... 1, 19

28 U.S.C. § 2410(a)(1) 4, 19, 21

28 U.S.C. § 2410(c) 5, 19, 21

28 U.S.C. § 2410(d) 4, 23

Colo. Rev. Stat. Ann.:

§ 38-38-111(2) 23

§ 38-38-302 ..... 23, 25

§ 38-38-302(4) 23

§ 38-38-501 ..... 1, 15, 24, 25

§ 38-38-506 ..... 1, 21

§ 38-38-506(1) 3

§ 38-38-506(2) 4

§ 38-38-506(2)(a) 3, 14, 24

§ 38-38-506(2)(b) 14

LEGISLATIVE MATERIALS

S. Rep. No. 89-1708 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 3722 ..... 22, 24

S. Rep. No. 105-174 (1998) 20

OTHER MATERIALS

Brief for the United States, *United States v. Williams*, 514 U.S. 527 (1995) (No. 94-395) .. 19-20

Henry J. Friendly, *In Praise of* Erie – *and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964) 16

19 Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 1996) 17

Timothy J. Russell and Anita L. Russell respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 551 F.3d 1174. The judgment on the pleadings of the district court (Pet. App. 14a-16a) is not reported.

JURISDICTION

The court of appeals entered its judgment on December 19, 2008. On March 11, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including April 18, 2009 (a Saturday). *See* Pet. App. 33a. On April 6, 2009, Justice Breyer further extended the time within which to file a petition for a writ of certiorari to and including May 18, 2009. *See id.* at 34a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Internal Revenue Code (26 U.S.C. §§ 6323(a) and (f), 7425), 28 U.S.C. § 2410, and Colorado Revised Statutes Annotated §§ 38-38-501 and 38-38-506 are reproduced at Pet. App. 19a-32a.

STATEMENT

1. Section 6321 of the Internal Revenue Code (the "Code") provides: "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property . . . belonging to such person." 26 U.S.C. § 6321. Such federal tax liens "arise at the time the assessment is made and . . . continue until the liability . . . is satisfied or becomes unenforceable by reason of lapse of time." *Id.* § 6322. Although federal tax liens are enforceable against "purchasers" of encumbered property so long as the government complies with certain notice obligations, *id.* § 6323(a); *see id.* § 6323(f), federal tax liens that are junior to other interests may be discharged in certain circumstances that accompany the transfer of property.

In particular, when a taxpayer defaults on an obligation secured by an interest that is senior to the government's tax lien, the government's rights in the foreclosure sale are determined in part by federal statutory law and in part by state-law rules of decision. Section 7425(b) of the Code governs the disposition of federal tax liens in nonjudicial foreclosure sales. That section provides that, if the government is provided with timely notice of the sale (or has itself failed properly to record its notice), the sale "shall have the same effect with respect to the discharge or divestment of such lien . . . as may be provided . . . by . . . local law." *Id.* § 7425(b)(2). The government, in other words, is treated as an ordinary participant in the proceedings. By contrast, if the government holds a properly recorded lien but "is not given notice of such sale," the sale is "made subject to and without disturbing [the federal tax] lien." *Id.* § 7425(b)(1).

Colorado, like many other states, has implemented post-sale procedures to resolve the claims of a party – like the federal government in the latter situation above – that has an "interest . . . junior to the deed of trust or other lien being foreclosed [that] would otherwise be extinguished by the foreclosure" but that has not been "notified . . . of a sale." Colo. Rev. Stat. Ann. § 38-38-506(1). Colorado's "omitted parties" statute provides that "[t]he interest of an omitted party in the property that is the subject of a sale may be terminated if the omitted party . . . is afforded rights of cure . . . or is afforded redemption rights" in a civil action commenced by a subsequent purchaser "at any time" after the foreclosure sale has been completed. *Id.* § 38-38-506(2)(a).

2. The facts that give rise to this case are not in dispute. In August 2003, Ashcroft Homes, Inc. ("Ashcroft") obtained a construction loan in the amount of $506,400, secured by a deed of trust to the property it was to develop in Colorado Springs, Colorado. Pet. App. 2a. In July 2004, the Internal Revenue Service ("IRS") filed a notice of federal tax lien against Ashcroft on the property in the amount of $160,353 for Ashcroft's unpaid tax liability. *Id.* The IRS properly recorded the lien with the Clerk and Recorder of El Paso County, Colorado. *Id.* In October 2004, the deed of trust was assigned to Timber Creek Holdings, L.P. ("Timber Creek"). *Id.* In February 2005, Timber Creek initiated foreclosure proceedings after Ashcroft defaulted on its loan. *Id.* On April 13, 2005, the Public Trustee of El Paso County conducted a foreclosure sale, at which Timber Creek purchased the property for $630,988. *Id.* That amount discharged the senior obligation, but left no funds available to satisfy junior interests. The IRS was not given notice

of the foreclosure sale. In November 2005, Timber Creek sold the property to Petitioners. *Id.*

3. On March 7, 2007, Petitioners filed this action in the District of Colorado to quiet title to their property. *See* 28 U.S.C. § 2410(a)(1) ("[T]he United States may be named a party in any . . . suit in any district court . . . to quiet title to . . . real or personal property on which the United States has or claims a . . . lien."). Petitioners argued that the United States was an "omitted party" under Colorado law and that the United States' tax lien could therefore be discharged pursuant to Colorado Revised Statutes Annotated § 38-38-506(2) so long as the IRS was given the opportunity to redeem the property. The government moved to dismiss, arguing that 26 U.S.C. § 7425(b) preempted the Colorado omitted-parties statute. Specifically, the government argued that § 7425's preservation of the federal tax lien "[un]-disturb[ed]" by the foreclosure sale was incompatible with the Colorado statute, which required the government to choose between redemption of the property and discharge of the lien.

The district court denied the government's motion to dismiss and granted judgment on the pleadings in favor of Petitioners. Pet. App. 15a.[1]

4. The court of appeals reversed and remanded with instructions to grant the government's motion to dismiss. The court concluded that § 7425 "'dictates the method for discharging a tax lien when the underlying property is sold,'" Pet. App. 9a (quoting *Security*

---

[1] The court computed the redemption price pursuant to 28 U.S.C. § 2410(d). *See* Pet. App. 15a. Under that calculation, the government would have to pay Timber Creek's purchase price at the foreclosure plus statutory interest from the foreclosure sale to the date of redemption. *See id.*

Pac. Mortgage Corp. v. Choate, 897 F.2d 1057, 1058 (10th Cir. 1990)), and therefore that "Congress intended federal law to 'occupy the field' in resolving such federal tax lien issues," *id.* at 10a.

The court also concluded that "the remedy in Colo. Rev.Stat. §§ 38-38-501 and 38-38-506, which requires extinguishment of the government's lien if it fails to redeem the property, conflicts with the remedy provided in § 7425(b), which preserves the government's lien." *Id.* at 11a. The court noted that § 7425(d)(1), which provides that the government "*may* redeem . . . property within the period of 120 days from the date of . . . sale" is "permissive," *id.*, and specifies "simply one of the options the government may use to enforce a lien," *id.* at 12a. The court distinguished a line of Tenth Circuit cases upholding the post-sale application of the equitable lien doctrine – a state-law doctrine that allows a senior lien holder to extinguish a junior lien after a nonjudicial sale held without proper notice – on the ground that those cases raised only the "issue of whether [the government's] junior lien was automatically elevated to priority status over another senior lien holder." *Id.* Finally, the court rejected the argument that 28 U.S.C. § 2410(c) – which provides that "[a] judgment or decree in [a quiet title suit] shall have the same effect respecting the discharge of the property from the . . . lien held by the United States as may be provided . . . by . . . local law" – requires the application of state law, reasoning that that section is a "general statement[] of law which do[es] not affect [the] conclusion that Congress, in enacting § 7425(b), intended federal law to apply when the government fails to receive notice of a nonjudicial sale." *Id.* at 13a.

REASONS FOR GRANTING THE PETITION

The Internal Revenue Code expressly provides that, when the government receives proper notice of a nonjudicial foreclosure sale, the government's tax lien is treated like any other lien on the property, such that the foreclosure sale can extinguish the government's lien. In the event that the government does not receive notice of the sale, the Code protects the government's interests by preventing the lien from being extinguished in the sale. But the Code does not expressly address the effect on the government's lien of *post-sale* remedies for defective notice provided under state law.

The decision below – which holds that Colorado's omitted-parties statute is displaced by federal law – conflicts with decisions from two other courts of appeals that have held that the Federal Tax Lien Act of 1966 does not displace post-sale state-law remedies for omitted parties to a nonjudicial foreclosure sale. The decision also conflicts with this Court's long-established approach to the interplay between state and federal law with respect to federal tax liens, which provides that, absent express displacement, state-law property rules continue to govern federal lien interests. Because it casts doubt on the laws of many states and the property transactions carried out under those laws, the Court should grant the petition and reverse the decision below.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE NINTH AND ELEVENTH CIRCUITS THAT ALLOW POST-SALE DISCHARGE OF FEDERAL TAX LIENS PURSUANT TO STATE LAW

In *United States v. Brosnan*, 363 U.S. 237 (1960), this Court held that, because "[f]ederal tax liens are wholly creatures of federal statute," "matters directly affecting the nature or operation of such liens are federal questions, regardless of whether the federal statutory scheme specifically deals with them or not." *Id.* at 240 (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943)). Nevertheless, the Court found it "desirable to adopt as federal law state law governing divestiture of federal tax liens, except to the extent that Congress may have entered the field." *Id.* at 241. Congress entered the field in 1966 with the Federal Tax Lien Act, Pub. L. No. 89-719, 80 Stat. 1125, which enacted 26 U.S.C. § 7425. The courts of appeals have taken divergent views of the extent to which Congress intended that section to displace the state-law rules adopted in *Brosnan*. The Ninth and Eleventh Circuits have limited the scope of displacement to state-law rules that result in the automatic discharge of a federal tax lien in the course of the foreclosure sale. *See Tompkins v. United States*, 946 F.2d 817, 820 (11th Cir. 1991) ("If any pre-emptive effect was intended by Congress, we believe it is limited to pre-emption of local laws which would *completely discharge the government's junior interest* without clear notice to the government.") (emphasis added); *First Am. Title Ins. Co. v. United States*, 848 F.2d 969, 972 (9th Cir. 1988) ("In the event the government did not receive notice, Congress intended *only to shield the government's*

junior liens from extinction so the government could protect its interests *at a later date*.") (emphases added); *see also Vereyken v. Annie's Place, Inc.*, 964 F.2d 593, 596 (6th Cir. 1992).

Both *Tompkins* and *First American Title* thus held that state equitable procedures continued to apply *post-sale* to correct a defect in notice to the government. In this case, by contrast, the Tenth Circuit held that federal displacement of state law extended to post-sale remedies provided by Colorado's omitted-parties statute that are functionally indistinguishable from the equitable remedies applied in other circuits. This Court's review is warranted to settle the confusion among the circuits over the proper scope of displacement under § 7425.

A. The Ninth and Eleventh Circuits Narrowly Construe the Scope of Displacement of State Law

In *First American Title*, Provident Federal Savings Bank ("Provident") held a prime deed of trust in certain California property. The deed of trust incorrectly identified the owner as "Mark *H.* Moss." Several junior federal tax liens on the property were recorded against the owner's correct name – "Mark *A.* Moss." *See* 848 F.2d at 970 (emphasis added). "Provident initiated foreclosure proceedings against the property and conducted a title search under the name Mark H. Moss." *Id.* Provident's search failed to "discover[] the federal tax liens because they were recorded under the name Mark A. Moss." *Id.* The nonjudicial foreclosure sale therefore proceeded without notice to the government. Provident itself purchased the property at the foreclosure sale. *See id.*

When Provident discovered the existence of the federal tax liens, it – along with its title insurer – brought suit to quiet title against the IRS. Under California law, "the general rule is that a mortgagee's lien is extinguished when the mortgagee purchases the property to which his or her lien was attached." *Id.* at 971. That is, "the mortgagee's lesser interest (the lien) has 'merged' into the greater interest (the fee)." *Id.* In the ordinary course, then, Provident would no longer be a senior lien holder following the sale, but would instead be the *owner* in fee simple. And, by virtue of § 7425(b)(1), Provident would have taken the property "subject to and without disturbing" the federal tax liens. *See id.* at 970 (noting plaintiffs' "conce[ssion] that Provident's failure to notify the IRS meant that the sale was 'made subject to and without disturbing' the tax liens"). Provident argued, however, that California "recognize[d] an equitable exception to the [merger] rule" whereby – if certain conditions were met – a purchase by the mortgagee at the foreclosure sale would *not* extinguish the mortgage. *Id.* at 971. "If Provident . . . [was] entitled to [such] equitable relief, then Provident's lien" – which was senior to the tax liens – would have "survived the sale." *Id.* Provident would then be free to carry out foreclosure proceedings anew on its senior equitable lien, this time with proper notice to the government.

The court of appeals first "adopt[ed] California law as the federal common law" to determine the status of the relevant property interests. *Id.* (citing *Brosnan*, 363 U.S. at 240-42; *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960)). The court then held that § 7425 does not displace California law with respect to the post-sale application of California's

equitable lien rule. *See id.* at 972-73. The court observed that, under the law of "some state[s]" prior to the enactment of § 7425(b)(1), "[j]unior liens held by the government could be extinguished" in the foreclosure sale "even though the government had not been notified of a sale." *Id.* at 972. The court held that § 7425 was a narrow response to that particular problem: it "assure[d] that the government received notice" of a sale so that "the government could protect its interest in having a fair sale." *Id.* "In the event," however, that "the government did not receive notice, Congress intended only to shield the government's junior liens from extinction so the government could protect its interests at a later date." *Id.*

The court held that § 7425 therefore did not prevent the application of state-law equitable remedies to restore the parties to their pre-sale positions. The court concluded that "[g]ranting equitable relief to Provident would not undermine Congress's intent" because "the government can protect its interest in having a fair sale in the future when Provident sells the property." *Id.* In short, "[g]ranting equitable relief" was "not inconsistent" with Congress's intent – to preserve the lien so that the government could participate in post-sale procedures that would vindicate its interest. *Id.* at 973. The court remanded the case for a determination whether Provident met the requirements for an equitable lien under California law. *See id.* at 973-74.[2]

---

[2] The Ninth Circuit declined to afford a purchaser equitable relief in *United States v. Polk*, 822 F.2d 871 (9th Cir. 1987). That decision, however, still adopted state law as the federal rule of decision. *See id.* at 874 ("Whether or not [the purchaser] retains any legal interest in the . . . property . . . is a matter of

The Eleventh Circuit reached a similar conclusion in *Tompkins v. United States*. In that case, too, the holder of a prime security interest in real property purchased the property at a nonjudicial foreclosure sale of which the United States did not receive notice. *See* 946 F.2d at 818-19. The parties agreed that "one of the consequences of this oversight was continuation of the IRS lien after the sale." *Id.* at 819 (citing 26 U.S.C. § 7425(b)(1)). After the IRS levied upon and seized the property, the purchaser brought an action for wrongful levy and to quiet title. *See id.*

The court of appeals applied Georgia's rule concerning merger, which provided for the creation of an equitable lien under circumstances similar to those described above. *See id.* at 819-20. The court held that failure to notify the government under § 7425 did not deprive the purchaser of his right to an equitable lien under Georgia law, reasoning that, "[i]f any pre-emptive effect was intended by Congress, . . . it is limited to pre-emption of local laws which would completely discharge the government's junior interest without clear notice to the government." *Id.* at 820. Because granting an equitable lien under Georgia law effectively returned the parties to their respective pre-sale positions, the court concluded that the government's interests were sufficiently protected under state law.[3] *See id.* at 821.[4]

Arizona law."). The court found that an equitable lien was not available under state law. *See id.* at 874-75; *First Am. Title*, 848 F.2d at 972 (distinguishing *Polk* on that basis).

[3] In *Southern Bank of Lauderdale County v. IRS*, 770 F.2d 1001 (11th Cir. 1985), the court of appeals declined to apply Alabama's equitable merger rule. *See id.* at 1007-09. The purchasers in that case, however, apparently failed to argue

B. The Tenth Circuit in This Case Held That § 7425 "Occupies the Field" with Respect to Discharge of Federal Tax Liens

In each of the cases described above, the court of appeals, following the approach set forth in *Brosnan*, adopted state law as the federal rule of decision except in the narrow circumstance in which Congress entered the field – preserving the government's junior lien from extinguishment by the foreclosure of a senior lien without notice to the government. Those courts uniformly held that the preservation of the government's junior tax lien in the foreclosure sale does not preclude the application of *post-sale* measures under state law that may alter the parties' respective lien interests.

By contrast, the Tenth Circuit in this case held that § 7425(b) "occup[ies] the field" with respect to

---

that Alabama law created an equitable exception to the merger rule. Instead, they argued that equitable principles applied to the question whether the government's interest was lower in priority than the purchaser's fee interest following the sale. *See id.* The court held, however, that the *priority* of federal liens is not determined by reference to state law. *See id.* at 1007. The priority of the government's lien is not at issue here.

[4] The Tenth Circuit itself applied Colorado's equitable merger doctrine in a line of cases beginning with *United States v. Colorado*, 872 F.2d 338 (10th Cir. 1989); *see Colorado Prop. Acquisitions v. United States*, 894 F.2d 1173, 1175-76 (10th Cir. 1990); *Security Pac. Mortgage Corp. v. Choate*, 897 F.2d 1057, 1058 (10th Cir. 1990); *see also Vereyken*, 964 F.2d at 596 (dicta). As described below, the Tenth Circuit in this case distinguished *Colorado* and its progeny on the ground that those cases involved the question whether § 7425(b) resulted in the government's junior lien being "automatically elevated to priority status over another senior lien holder." Pet. App. 12a. That distinction is not supportable for the reasons described *infra* Part I.B.

the discharge of federal tax liens, Pet. App. 10a, and therefore "'*dictates the method* for discharging a tax lien when the underlying property is sold,'" *id.* (quoting *Security Pac.*, 897 F.2d at 1058) (emphasis added). Unlike the courts described above, which construed narrowly the scope of displacement of state law by § 7425, the Tenth Circuit construed the scope of displacement broadly to eliminate state post-sale remedies.

The court further held that there was an "actual conflict" between the federal and state statutes, "because the remedy in Colo.Rev.Stat. §§ 38-38-501 and 38-38-506, which requires extinguishment of the government's lien if it fails to redeem the property, conflicts with the remedy provided in § 7425(b), which preserves the government's lien." *Id.* at 11a & n.4.[5] But even that narrower holding is at odds with the conclusion reached in *First American Title* and *Tompkins*. The Colorado statute conflicts with the federal provision only if § 7425 does more than preserve the government's lien following a nonjudicial foreclosure without notice. But *First American Title* and *Tompkins* expressly held that § 7425 does not extend any farther than that. *See First Am. Title*, 848 F.2d at 972; *Tompkins*, 946 F.2d at 820.

The court's holding that Colorado's omitted-parties statute does not apply to the federal government by virtue of § 7425 thus conflicts with those decisions that grant an equitable lien after a nonjudicial fore-

---

[5] Two district courts have reached the same conclusion with respect to Colorado and Oregon statutes. *See Bank One, Nat'l Ass'n v. United States*, No. 07-cv-00070-PSF-CBS, 2007 WL 2350101, at *5 (D. Colo. Aug. 15, 2007); *Wells Fargo Bank, N.A. v. United States*, No. 08-CV-221-AC, 2008 WL 4628382, at *4-*5 (D. Or. Oct. 14, 2008).

closure sale that can lead to extinguishment of the government's interest. Both the equitable lien and the exercise of post-sale redemption rights by a junior omitted party are post-sale mechanisms provided under state law to cure a notice defect in a nonjudicial foreclosure sale. The equitable lien operates to restore the foreclosed lien interest to the purchaser so that the sale can take place again with proper notice. Section 38-38-506(2)(a) addresses the situation where the foreclosing lien holder already has transferred the property to a third party. In that circumstance, where the sale cannot simply be undone, Colorado has determined that the omitted junior interest holder ought to be given the opportunity to redeem the property as if he were a participant in the sale from which he was omitted.[6]

The court – and the government, *see* Gov't C.A. Br. 7 – attempted to distinguish prior decisions involving equitable liens on the ground that those cases held only that § 7425(b) "'does not elevate the government's lien'" in priority. Pet. App. 12a (quoting *Security Pac.*, 897 F.2d at 1058). The court found that the equitable lien cases were "not relevant" to this case because "no issue was raised as to the jun-

---

[6] Further evidence that these remedies are complementary can be found in the fact that Colorado codifies each remedy as part of the same statute. Section 38-38-506(2)(a) provides for the discharge of an omitted party's lien following the opportunity for cure or redemption. Section 38-38-506(2)(b) provides that "the lien that is the subject of the sale shall not be extinguished by merger with the title to the property acquired . . . until the interest of any omitted party has been affirmed . . . or has been terminated as provided in paragraph (a)." That paragraph ensures that, if the foreclosing lien holder purchased the property, title does not merge until after the omitted party's rights are accounted for.

ior status of the government's lien." *Id.* The court's characterization of the equitable lien cases is inaccurate. In those cases, there was no question that the government's lien would be junior to the equitable lien *if such a remedy were available. See, e.g., First Am. Title*, 848 F.2d at 973; *Tompkins*, 946 F.2d at 821. Instead, the key issue in each case was whether the foreclosing lien holder's senior lien survived the sale, such that the new owner (that is, the foreclosing lien holder) could correct the defective notice and extinguish the government's junior lien. The answer to that question was determined as a matter of state property law, and the courts determined that § 7425 did not alter the availability of equitable relief. In this case, on the other hand, the court held that § 7425 *did* curtail the availability of post-sale relief under state law.[7]

---

[7] The *First American Title* court characterized its inquiry as one into "the nature of Provident's property interest after the sale" and followed the traditional rule that federal courts "adopt state law as the federal common law when deciding to what extent an individual has an interest in property to which a federal tax lien has attached." 848 F.2d at 970-71. The post-sale remedy in this case can easily be characterized in similar terms. Under Colorado law, the purchaser of property at a nonjudicial foreclosure sale takes the property "free and clear of all liens and encumbrances junior to the lien foreclosed" but still "subject to the provisions of section[] 38-38-506." Colo. Rev. Stat. Ann. § 38-38-501. Regardless of the characterization, the legal question remains whether § 7425 alters those state-created rights or displaces those post-sale remedies.

II. THE FEDERAL TAX LIEN ACT DOES NOT DISPLACE STATE POST-SALE REMEDIES FOR DEFECTIVE NOTICE IN NONJUDICIAL FORECLOSURE SALES

The Tenth Circuit erred in concluding that § 7425 displaces state-law post-sale remedies for defective notice of nonjudicial foreclosure sales.

A. This Court Presumptively Adopts State Law As the Rule of Decision Concerning the Discharge of Federal Tax Liens

"[M]atters directly affecting the nature or operation of [federal tax] liens are federal questions, regardless of whether the federal statutory scheme specifically deals with them or not." *Brosnan*, 363 U.S. at 240 (citing *Clearfield Trust*, *supra*). "In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Clearfield Trust*, 318 U.S. at 367. Nevertheless, "[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-28 (1979); *see also* Henry J. Friendly, *In Praise of* Erie – *and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 410 (1964) (noting the separate question whether "the federal courts should adopt a uniform nation-wide rule or should follow state law"). In recent years, the Court has "endeavor[ed] to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards" or "unless application of the particular state law in question would frustrate specific objectives of the federal programs." *Kamen v. Kemper Fin. Servs.*,

Inc., 500 U.S. 90, 98 (1991) (internal quotation marks and alterations omitted); *see also Kimbell Foods*, 440 U.S. at 728-29 & nn.22, 24 (citing *Brosnan*, 363 U.S. at 241-42); 19 Charles Alan Wright et al., *Federal Practice and Procedure* § 4518, at 572-73 (2d ed. 1996) (noting the Court's "increasing emphasis on the notion that when determining what should be the content of federal common law, *the law of the forum state should be adopted absent some good reason to displace it*") (emphasis added). "Finally, [the] choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Kimbell Foods*, 440 U.S. at 728-29. "The presumption that state law should be incorporated into federal common law" is therefore "particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98.

Federal tax liens, though creatures of federal law, nevertheless operate in "an area of complex property relationships long since settled and regulated by state law." *Brosnan*, 363 U.S. at 242. This Court therefore generally "decline[s] to override intricate state [property] laws of general applicability on which private creditors base their daily commercial transactions." *Kimbell Foods*, 440 U.S. at 729. The Court has long held, for example, that the Federal Tax Lien Act "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States v. Bess*, 357 U.S. 51, 55 (1958); *see also United States v. Craft*, 535 U.S. 274, 278 (2002); *Drye v. United States*, 528 U.S. 49, 58 (1999).

With respect to the discharge of federal tax liens in particular, the Court in *Brosnan* held "it desirable to adopt as federal law state law governing divestiture of federal tax liens, except to the extent that Congress may have entered the field." 363 U.S. at 241. The Court observed that:

> It is true that such liens form part of the machinery for the collection of federal taxes, the objective of which is uniformity, as far as may be. However, when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures. Long accepted nonjudicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt. We think it more harmonious with the tenets of our federal system . . . not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule.

Id. at 241-42 (internal quotation marks and citation omitted).

B. Section 7425 Does Not Displace State-Created Post-Sale Remedies for Defects in Notice

1. The Tenth Circuit's conclusion that federal law "occup[ies] the field" concerning discharge of federal tax liens is squarely at odds with the analysis above.

Pet. App. 10a. Such broad "field preemption" applies only where a statute is "'sufficiently comprehensive . . . to justify an inference that Congress had occupied the field to the exclusion of the States.'" *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 441-42 (2005) (quoting *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607 (1991)). The lien provisions of the Code do not comprise such a statute. The court of appeals offered no analysis or citation to support the contrary conclusion.

More particularly, there is no evidence that Congress intended § 7425 to occupy the field with respect to discharge of federal tax liens. That section does not admit of the comprehensiveness required for field preemption. It does not specify all of the circumstances in which a lien may be discharged; rather, it consigns the discharge to state law in some circumstances, *see* 26 U.S.C. § 7425(a)(2), (b)(2), and specifies certain circumstances in which a lien is *not* to be discharged – that is, when the government has not received notice of a foreclosure, *id.* § 7425(a)(1), (b)(1).

Such a holding is also inconsistent with 28 U.S.C. § 2410. That section provides that "the United States may be named a party in any civil action . . . to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien." *Id.* § 2410(a)(1). "A judgment . . . in such action . . . shall have the same effect respecting the discharge of the property from the . . . lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated." *Id.* § 2410(c). The government has acknowledged that quiet title suits brought under that section may be used to discharge federal tax liens pursuant to state law. *See* Brief for the United

States at 17, *United States v. Williams*, 514 U.S. 527 (1995) (No. 94-395) (citing cases).

The government argued below that two other provisions of the Code – 26 U.S.C. §§ 6325(b)(4) and 7426(a)(4), which establish an administrative mechanism for third-party property owners to obtain a "certificate of discharge" by posting a bond for the outstanding lien amount as determined by the IRS and then challenging the amount so determined in court – provide the "sole remedy for a third-party property owner" seeking to discharge a federal tax lien. Gov't C.A. Br. 27.[8] There is no language in those sections, however, that suggests they are the exclusive remedy for third parties whose property is burdened by another taxpayer's lien. The provision of § 7426(a)(4) that the government cites to support its broad assertion – "[n]o other action may be brought by such person for such a determination" – refers to *judicial review* of the *IRS*'s determination of the value of the lien. The legislative history also clearly supports the continuing viability of quiet title suits. *See* S. Rep. No. 105-174, at 55 (1998) ("Actions to quiet title under 28 U.S.C. § 2410 would still be available to persons who did not seek the expedited review permitted under the new statutory procedure.").[9]

---

[8] The court of appeals declined to evaluate this claim. *See* Pet. App. 4a n.1.

[9] Several courts of appeals have held that the statutory remedy described above precludes third parties from simply paying the lien and then suing for a tax refund under 28 U.S.C. § 1346(a)(1). *See Munaco v. United States*, 522 F.3d 651, 655-57 (6th Cir. 2008); *First Am. Title Ins. Co. v. United States*, 520 F.3d 1051, 1053-54 (9th Cir. 2008). Those courts have not addressed whether quiet title suits brought pursuant to state

2. Nor is there any actual conflict between § 7425(b)(1) and Colorado's § 38-38-506. Section 7425(b)(1) provides that "a sale of property on which the United States has or claims a lien . . . under the provisions of . . . title [26] . . . shall . . . be made subject to and without disturbing such lien . . . , if notice of such lien was filed . . . more than 30 days before such sale and the United States is not given notice of such sale." 26 U.S.C. § 7425(b)(1). There is nothing in that statutory language to suggest that it displaces state *post-sale* rules – like § 38-38-506 – that may result in the discharge of federal tax liens. The statute is silent with respect to the application of state law in those circumstances.

The structure of the Code's lien provisions supports that reading. The enactment of § 7425 left undisturbed the provisions that waive sovereign immunity to quiet title suits for the discharge of federal liens. *See* 28 U.S.C. § 2410(a)(1). Such suits are governed by state law. *See id.* § 2410(c).

"It is presumable," moreover, "that Congress legislates with knowledge of [this Court's] basic rules of statutory construction," *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), and well-established "background practice[s]," *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring in the judgment). The 1966 Congress that enacted § 7425(b) can be deemed to have been aware of *Brosnan* and *Bess* and this Court's reluctance to "intrude upon relationships traditionally governed by state law" absent explicit congressional sanction. *Brosnan*, 363 U.S. at 240.

---

law are still effective, and the applicable analysis under this Court's precedents indicates that they are – a conclusion buttressed by the legislative language quoted above.

In light of those background principles, Congress's intervention in the area must be read narrowly. Section 7425(b)(1) eliminates state authority to discharge federal liens in a nonjudicial foreclosure sale without notice. But it goes no further.

The legislative history of the Federal Tax Lien Act of 1966 supports that narrow reading. The Senate report accompanying the legislation expresses concern with the practice under some states' laws whereby federal tax liens were "extinguished without the United States having actual notice of the proceedings, under circumstances where it is not possible for the [IRS] to take steps to protect the United States in the collection of its tax revenues." S. Rep. No. 89-1708, at 27 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 3722, 3748. The report explains that § 7425(b)(1) addresses that problem: "[w]here foreclosures covered by this provision are made without proper notice to the Government, the bill provides that this does not affect the Government's claim under a tax lien." *Id.* at 28, 1966 U.S.C.C.A.N. 3749.

The statute is silent on the circumstances other than unnoticed foreclosure sales in which federal tax liens may be discharged. In light of that silence, the court of appeals erred in displacing state law absent some "frustrat[ion]" of "specific objectives of the federal programs." *Kimbell Foods*, 440 U.S. at 728.

3. The application of the state-law post-sale remedies for defective notice at issue here does not undermine the government's ability to protect its interests. To the contrary, Colorado's omitted-parties statute affords the government the same rights it would have been afforded if it had notice of the sale – a conclusion that the government has never challenged.

In a nonjudicial foreclosure sale under Colorado law (which is in line with conventional practice), the proceeds of the sale first go to satisfy the foreclosing senior lien; any excess funds go to satisfy more junior liens in order of priority. *See* Colo. Rev. Stat. Ann. § 38-38-111(2). Junior lien holders whose debts cannot be satisfied from the proceeds of the sale are given the option to "redeem" the property, in descending order of seniority. *See id.* § 38-38-302. The redemption procedure allows a junior lien holder to buy the property from the purchaser after the foreclosure sale for the purchase price (and, usually, accrued interest and expenses). *See id.* § 38-38-302(4). Redemption thus offers junior lien holders the opportunity to purchase and resell the property and retain the profit in satisfaction of the debt if they believe that the price obtained in foreclosure was too low.

The Code provides the government with an equivalent redemption right. When the government receives proper notice, a nonjudicial sale has "the same effect with respect to the discharge or divestment of such lien . . . of the United States, as may be provided with respect to such matters by the local law." 26 U.S.C. § 7425(b)(2). Section 7425(d) provides, however, that after such a sale the government "may redeem" the property, at a price "prescribed by" 28 U.S.C. § 2410(d) (the purchase price plus statutory interest and certain expenses).[10] "Congress intended the redemption statute to prevent foreclosure purchasers from buying real property for less than the fair market value and then selling the real prop-

---

[10] The government has not argued that the redemption amount established in § 38-38-302(4) is inconsistent with the amount specified in § 2410(d); if there were any inconsistency, the federal rule would control.

erty and keeping the profit." *Vardanega v. IRS*, 170 F.3d 1184, 1186 (9th Cir. 1999) (citing S. Rep. No. 89-1708). The right of redemption therefore protects the government's interests in the foreclosure sale; it "prevent[s] a potential windfall to a foreclosure purchaser" by allowing "the IRS [to] repay the purchaser the purchase price and sell the property at closer to fair market value." *Id.*

The Colorado omitted-parties statute provides that, if a junior lien holder does not receive proper notice of a nonjudicial foreclosure sale, the purchaser takes the property subject to the junior lien holder's right of redemption. *See* Colo. Rev. Stat. Ann. § 38-38-501 (providing that, "[u]pon the expiration of all redemption periods . . . , title to the property sold shall vest in the [purchaser or last redeemer]" "free and clear of all liens and encumbrances junior to the lien foreclosed" yet still "[s]ubject to the provisions of section[] 38-38-506"). That approach is fully in harmony with § 7425(b)(1). In such situations, the state statute provides what is, in effect, a nunc-pro-tunc right to redeem the property: the "interest of an omitted party in the property that is the subject of a sale may be terminated if the omitted party, in a civil action . . . , is afforded redemption rights if the omitted party would have been entitled to redeem pursuant to section 38-38-302, upon such terms as the court may deem equitable under the circumstances, which terms shall not, however, be more favorable than the person's statutory rights." *Id.* § 38-38-506(2)(a).

The state statute thus ensures that – in the event the government fails to receive notice of the foreclosure sale – the government can *still* exercise its redemption right. *See id.* Only if the government chooses not to do so is the lien extinguished – just as

it would be if the government chose not to exercise its redemption right after a nonjudicial sale *with* notice. State law provides complete protection of the government's interest. The court of appeals' imposition of a contrary federal rule is unwarranted.

C. The Tenth Circuit's Holding Creates an Unjustified Windfall for the Government

By immunizing federal tax liens from discharge in post-sale state proceedings to remedy notice defects, the court of appeals has granted the government an inequitable windfall. The facts of this case illustrate the problem. In this case, the purchase price at foreclosure was sufficient only to satisfy Timber Creek's senior lien; no funds remained for junior lien holders, including the government. If the government had been given notice of the sale, then the government would have had the option of redeeming the property or seeing its lien discharged without satisfaction. *See* 26 U.S.C. § 7425(b)(2); Colo. Rev. Stat. Ann. §§ 38-38-302, 38-38-501. Colorado's remedy for omitted parties would put the government in the same position it would have been in had it received notice. Under the court of appeals' overbroad reading of § 7425(b)(1), on the other hand, the government can choose not to redeem yet still maintain an encumbrance on the property. The government has thus been granted a second chance to satisfy its lien, a chance not granted to any other lien holder. Compounding the inequity is the fact that the government's lien now encumbers property in the hands of a third-party purchaser for value who did not incur the underlying tax obligation.

The Ninth and Eleventh Circuits have held that § 7425(b)(1) does not work such a result. Instead, it merely preserves the government's lien so that the government can vindicate its interest in accord

with governing state law. Because Colorado law "'furnish[es] [a] convenient solution[] in no way inconsistent with adequate protection of the federal interests,'" this Court should reverse the Tenth Circuit's contrary conclusion. *Kimbell Foods*, 440 U.S. at 729 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 309 (1947)) (alteration omitted).

III. THE SCOPE OF DISPLACEMENT OF STATE LAW BY THE FEDERAL TAX LIEN ACT IS A QUESTION OF SIGNIFICANT NATIONAL IMPORTANCE

The Tenth Circuit's ruling in this case threatens to upend established state-law mechanisms for conducting orderly foreclosure sales that protect the interests of all lien holders at a time when such rules are becoming even more critical to the successful operation of the market for real property.

State-law remedies for omitted parties exist in recognition of the fact that mistakes inevitably occur in the conduct of foreclosure sales. Names may be recorded incorrectly, *e.g.*, *First Am. Title*, 848 F.2d at 970; title searches may be inaccurate; or, as in this case, lien holders may otherwise be omitted accidentally. States establish procedures for addressing these mistakes as part of their framework of property and commercial rules of general applicability. Those rules in turn form the basis for commercial relationships predicated upon settled expectations of the governing law. Were the Tenth Circuit's rule to be adopted, "[l]ong accepted nonjudicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt." *Brosnan*, 363 U.S. at 242. Such a significant

potential upheaval of settled expectations warrants this Court's review.

Indeed, the Tenth Circuit's decision casts doubt on the settled real property laws of any state that, like Colorado, provides post-sale mechanisms for mistakenly omitted parties to vindicate the rights they would have had in a foreclosure sale. This increased uncertainty comes during a time in which foreclosure sales are increasingly common. With the recent turmoil in nationwide housing markets, foreclosures of real property are unfortunately becoming more frequent. It is therefore increasingly important that such sales be conducted in an orderly manner and in conformity with the settled expectations of the parties to such transactions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

AARON M. PANNER
Counsel of Record
MICHAEL J. BURSTEIN
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

May 18, 2009

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Tenth Circuit, *Russell v. United States*, No. 07-1438 (Dec. 19, 2008) 1a

Judgment on the Pleadings of the United States District Court for the District of Colorado, *Russell v. United States*, Civil Action No. 07-CV-00456-RPM-BNB (Aug. 17, 2007) 14a

Minute Order of the United States District Court for the District of Colorado, *Russell v. United States*, Civil Action No. 07-CV-00456-RPM (July 10, 2007) 17a

Statutory Provisions Involved 19a

Internal Revenue Code (26 U.S.C.):

26 U.S.C. § 6323(a) 19a

26 U.S.C. § 6323(f) 19a

26 U.S.C. § 7425 ..... 22a

28 U.S.C. § 2410 ..... 26a

Colo. Rev. Stat. Ann.:

§ 38-38-501 ..... 30a

§ 38-38-506 ..... 31a

Letter from Supreme Court Clerk regarding grant of extension of time for filing a petition for a writ of certiorari (Mar. 11, 2009) 33a

Letter from Supreme Court Clerk regarding grant of extension of time for filing a petition for a writ of certiorari (Apr. 6, 2009) 34a

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 07-1438

TIMOTHY J. RUSSELL AND ANITA L. RUSSELL,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant,

AND

HOLLY WILLIAMS,
PUBLIC TRUSTEE OF EL PASO COUNTY,
Defendant.

Dec. 19, 2008

Before MURPHY, BRORBY and HARTZ, Circuit Judges.

BRORBY, Circuit Judge.

Appellant United States (hereafter "government") appeals the district court's judgment in favor of Timothy and Anita Russell (the Russells) in their federal action to quiet title in their real property on which the government holds a recorded federal tax lien. The government contends the district court erred in relying on Colorado law in granting the Russells judgment because a provision of the Internal Revenue Code, 26 U.S.C. § 7425(b), preempts state

law and leaves federal tax liens undisturbed where the government did not receive notice of a nonjudicial sale. We exercise our jurisdiction under 28 U.S.C. § 1291 and reverse and remand with instructions for the district court to vacate its prior judgment and enter judgment in favor of the government on its motion to dismiss the complaint.

I. Factual and Procedural Background

During the underlying action, the parties agreed to the following undisputed pertinent facts. In August 2003, Ashcroft Homes, Inc. (Ashcroft) obtained a construction loan in the amount of $506,400 from U.S. Bank in exchange for a deed of trust to the property in question. Almost a year later, in July 2004, the Internal Revenue Service (IRS) filed a notice of a federal tax lien against Ashcroft on the property in the amount of $160,353.09, and on July 23, 2004, the Clerk and Recorder of El Paso County, Colorado, recorded the lien. On October 24, 2004, U.S. Bank assigned the deed of trust to Timber Creek Holdings, L.P. (Timber Creek).

In February 2005, after Ashcroft defaulted on its loan, Timber Creek commenced foreclosure proceedings. On April 13, 2005, the Public Trustee of El Paso County conducted a foreclosure sale at which Timber Creek purchased the property for $630,987.94. However, the government was not provided notice of the foreclosure sale. In November 2005, Timber Creek sold the property to the Russells.

On March 7, 2007, the Russells filed a complaint against the United States seeking to quiet title to their property under Colo.Rev.Stat. § 38-38-506(2)(a). The government moved to dismiss the complaint in conjunction with 26 U.S.C. § 7425(b)(1), contending it preempted Colorado law and required the lien

remain undisturbed unless it received notice of the sale, which it did not.

At a hearing held on the government's motion to dismiss, the district court heard argument from both parties, determined no factual disputes existed, and granted judgment in favor of the Russells, relying on Colo.Rev.Stat. § 38-38-506(2) and 26 U.S.C. 7425(d), a redemption provision, in holding the government must redeem or purchase the property for $710,959.42 within 120 days or forfeit its lien, making title to the property "free and clear of any claim of lien" by the government. This appeal followed.

II. Discussion

On appeal, the government poses the same argument it made before the district court, contending the Colorado statute on which the district court relied conflicts with and is preempted by provisions of the Internal Revenue Code governing the validity of federal tax liens after a nonjudicial sale. In making this argument, it points out that a government lien generally attaches to the delinquent taxpayer's property and rights to that property, and the lien remains attached even if the property is transferred to a third party. In a case, like here, where a nonjudicial sale occurs on property in which the government holds a tax lien, it argues these general principles continue to apply through 26 U.S.C. § 7425(b), which requires, as intended by Congress, for the lien to remain undisturbed if the Secretary of Treasury did not receive notice of the sale at least twenty-five days prior to the sale and the government properly recorded notice of the lien at least thirty days before the sale. The government points out this remedy allows it to enforce its junior lien against the property through administrative or judicial proceedings, which is in-

compatible with the remedy in Colo.Rev.Stat. § 38-38-506, which provides the interest of a lien holder who did not receive notice of nonjudicial sale must be terminated if the lien holder is given the opportunity to exercise rights to cure and redeem the property and fails to do so. It also argues subsection (d) of 26 U.S.C. § 7425, allowing the government to redeem property, merely gives the United States a permissive right to redeem property referenced in § 7425(b) within 120 days and is only one of several options the government may pursue to enforce its lien.[1]

In response, the Russells argue in favor of the district court's application of Colo.Rev.Stat. § 38-38-506(2)(a). They contend 26 U.S.C. § 7425(b) does not contain language expressly or impliedly preempting state law and that this circuit's existing case law establishes Colo.Rev.Stat. § 38-38-506 does not contravene 26 U.S.C. § 7425(b). In addition, they point out that subsection (d) of 26 U.S.C. § 7425, like § 38-38-506, also prescribes redemption as a remedy so that the state and federal remedies are similar and not in conflict. They further argue the purpose of the Federal Tax Lien Act of 1966[2] is not served by the government's argument because 26 U.S.C. § 6323(a) and (f) make federal lien priorities subject to a state's

---

[1] The government also suggests the Russells' only remedy for removing the lien is outlined in 26 U.S.C. § 6325(b)(4)(A), which requires them to either deposit cash or a bond in the amount the government determines to be the value of its lien interest, after which they have 120 days to file an action challenging the value of the lien and possibly obtaining a refund of any amount exceeding the value determined by the court. Any issue of other relief available to the Russells is not before us on appeal for disposition, and therefore, we do not address it.

[2] Pub.L. No. 89-719, 80 Stat. 1125 (as codified in 26 U.S.C. §§ 3505, 7425-26, 7810) (1966).

priority scheme, and 28 U.S.C. § 2410(a) and (d)[3] reference both state court jurisdiction and laws of the situs state, illustrating state, rather than federal, law should be applied.

We begin with our standard of review for a motion to dismiss, which is the procedural vehicle on which the government sought resolution and the district court disposed of the case. "Because the sufficiency of a complaint is a question of law, we review de novo the district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), applying the same standards as the district court." *Sunrise Valley, LLC v. Kempthorne*, 528 F.3d 1251, 1254 (10th Cir.2008) (internal quotation marks and citation omitted), *petition for cert. filed*, 77 USLW 3267 (Oct. 20, 2008) (No. 08-537). "Those standards require that we must accept as true all well-pleaded facts, and construe all reasonable allegations in the light most favorable to the plaintiff." *Id.* Dismissal is appropriate for "failure to state a claim upon which relief can be granted," Fed. R. Civ. Proc. 12(b)(6), which, in rare instances, may occur on the "basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *see also Gregory v. United States*, 942 F.2d 1498, 1500 (10th Cir.1991).

We next turn to the issue of preemption, on which the government brought its motion to dismiss and its

---

[3] While the Russells cite subsection (d), it does not contain any reference to the local laws of the situs state. *See* 28 U.S.C. § 2410(d). Instead, we assume they are referring to subsection (c), which references "the local law of the place where the court is situated" in generally discussing judgments or decrees discharging property from liens held by the United States. *See* 28 U.S.C. § 2410(c).

appeal. A fundamental principle in the Constitution under the Supremacy Clause "is that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). The preemptive effect of federal law may be apparent from the express terms of the statute, or it may be implicit. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). Implicit preemption of state law may occur in at least two circumstances, when: (1) Congress intends federal law to "occupy the field," or (2) state law is naturally preempted to the extent it conflicts with a federal statute. *See Crosby*, 530 U.S. at 372, 120 S.Ct. 2288. Such conflict occurs when "compliance with both federal and state regulations is a physical impossibility" or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas*, 461 U.S. at 204, 103 S.Ct. 1713 (internal quotation marks and citations omitted).

In determining whether a statute expressly or implicitly preempts state law, we look to the principles of statutory construction. "We review a district court's statutory interpretation de novo," and "[i]t is our primary task in interpreting statutes to determine congressional intent, using traditional tools of statutory construction." *United States v. Manning*, 526 F.3d 611, 614 (10th Cir.2008) (internal quotation marks and citations omitted), *cert. dismissed*, 2008 WL 4656882 (Dec. 19, 2008). In ascertaining such congressional intent, "[w]e begin by examining the statute's plain language," and "[i]f the statutory language is clear, our analysis ordinarily ends." *Id.*

Moreover, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Cuba Soil & Water Conservation Dist. v. Lewis*, 527 F.3d 1061, 1065 (10th Cir.2008) (internal quotation marks and citation omitted), *petition for cert. filed*, 77 USLW 3252, 2009 WL 56222 (Oct. 13, 2008) (No. 08-499). "If the statute's plain language is ambiguous as to Congressional intent, we look to the legislative history and the underlying public policy of the statute." *Manning*, 526 F.3d at 614 (internal quotation marks and citation omitted).

With these principles in mind, we turn to the statutes at issue in this appeal. Under Colorado law, when a person or entity with a recorded interest, such as a lien holder, is not named as a party defendant in the foreclosure action or properly notified of the foreclosure sale, that person or entity is considered an "omitted party." *See* Colo.Rev.Stat. § 38-38-506(1). Generally, an omitted lien holder's interest in the foreclosed property may be terminated if, in a civil action commenced by an interested person, the omitted lien holder is afforded rights of cure and redemption. *See* Colo.Rev.Stat. § 38-38-506(2). The omitted lien holder has a right to redeem the property within a specified time, and if no redemption occurs within that time frame, title of the property sold "shall vest" in the holder of the certificate of purchase or redemption. *See* Colo.Rev.Stat. § 38-38-501.

In determining whether federal law preempts such state law, we turn to the federal statute at issue, the legislative history of 26 U.S.C. § 7425(b), and case law applicable to government tax liens. As the government contends, a properly filed government tax

lien generally attaches to a delinquent taxpayer's property and rights to that property and remains attached, even if the property is transferred to a third party, until the lien is satisfied or becomes unenforceable by reason of lapse of time. *See* 26 U.S.C. §§ 6321 and 6322; *United States v. Cache Valley Bank*, 866 F.2d 1242, 1244 (10th Cir.1989). The transfer of the attached property "does not affect the lien because no matter into whose hands the property goes, the property passes *cum onere*, or with the lien attached." *Cache Valley*, 866 F.2d at 1244-45. When the property on which the United States has or claims a tax lien is involved in a nonjudicial sale, we have looked beyond these general principles specifically to 26 U.S.C. § 7425(b). *See Sec. Pac. Mortgage v. Choate*, 897 F.2d 1057, 1058 (10th Cir.1990). Section 7425(b) provides, in part, that such property:

> shall, except as otherwise provided, be made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or recording more than 30 days before such sale and the United States is not given notice of such sale
>
> . . . .

26 U.S.C. § 7425(b)(1). Another subsection of § 7425 requires notice of the sale of such property must be provided to the Secretary of Treasury "in writing . . . not less than 25 days prior to such sale." 26 U.S.C. § 7425(c)(1). Thus, a fair reading of § 7425(b) and (c) establishes a federal tax lien continues to attach to property, even in the event of a nonjudicial sale, so long as the United States recorded a notice of lien at least thirty days before the sale and it did not receive notice of such sale at least twenty-five days in advance.

Nevertheless, the Russells contend § 7425 does not expressly or implicitly provide for preemption of state law. We disagree. In previously addressing the issue of property sold in a nonjudicial sale without notice to the government as a tax lien holder, we held "Section 7425(b) of the Internal Revenue Code dictates the method for discharging a tax lien when the underlying property is sold." *Security Pacific*, 897 F.2d at 1058; *see also Orme v. United States*, 269 F.3d 991, 994 (9th Cir.2001) (holding § 7425(b) governs nonjudicial sales of property on which the government claims a federal tax lien). In considering the language of the statute, we held that "when proper notice is not given to the IRS and the government has complied with the filing requirements of § 7425(c), the sale of the property is made subject to and without disturbing the tax lien or title." *Security Pacific*, 897 F.2d at 1058 (internal quotation marks and citation omitted). Stated another way, in *United States v. Colorado*, 872 F.2d 338, 341 (10th Cir.1989), we determined that if "the senior lienholder fails to give notice of the sale to the government, the government's junior lien is preserved and the purchaser of collateral takes [the] property 'subject to' the government's lien." In contrast, if proper notice is given to the government, we have held "local law will determine the discharge or divestment of the tax lien." *Security Pacific*, 897 F.2d at 1058.

In addressing this issue in conjunction with another issue on the priority status of a government lien, we found it necessary to look at the legislative history of § 7425 and concluded Congress enacted § 7425(b) because it recognized "[f]oreclosure without notice had the effect of extinguishing" the government's lien "under circumstances where it [was] not

possible for the [government] to take steps to protect the United States in the collection of its tax revenues." *United States v. Colorado*, 872 F.2d at 341 (quoting S.Rep. No. 89-1708 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3722, 3748). To the extent § 7425 is ambiguous as to Congress's intent to preserve the government's tax lien when it fails to receive proper notice, the legislative history of § 7425 states:

> Where foreclosures covered by this provision are made without proper notice to the Government, the bill provides that this does not affect the Government's claim under a tax lien (as where the Government is not joined in a judicial foreclosure). In these cases, the Government's claim continues against the property into the hands of a third party. On the other hand, where notice of the Government's claim under a tax lien is not filed . . . or where the Government is notified of the proceeding, a sale has the same effect on the claim as local law provides with respect to similar claims.

S.Rep. No. 89-1708 at 28 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3722, 3749; H.R.Rep. No. 89-1884 at 26 (1966), *reprinted in* 1966-2 C.B. 815, 833, U.S.Code Cong & Admin.News 1996 at p. 3722. Thus, it is clear Congress intended federal law to "occupy the field" in resolving such federal tax lien issues, resulting in our conclusion § 7425(b) "dictates the method for discharging a tax lien when the underlying property is sold." *Security Pacific*, 897 F.2d at 1058; *see also Orme*, 269 F.3d at 994 (concluding that in enacting § 7425(b), "Congress has spoken clearly on the divestiture of federal tax liens in sales of property").

Moreover, it is evident Colorado law is naturally preempted where notice is not given to the govern-

ment as a lien holder. This is because the remedy in Colo.Rev.Stat. §§ 38-38-501 and 38-38-506, which requires extinguishment of the government's lien if it fails to redeem the property, conflicts with the remedy provided in § 7425(b), which preserves the government's lien.[4] Nevertheless, the Russells suggest 26 U.S.C. § 7425(d)(1), like Colo.Rev.Stat. §§ 38-38-501 and 38-38-506, requires the government to redeem the property or forfeit its lien. However, that subsection, entitled "Redemption by United States," simply states:

> (1) Right to redeem. – In the case of a sale of real property to which subsection (b) applies to satisfy a lien prior to that of the United States, the Secretary *may* redeem such property within the period of 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer.

26 U.S.C. § 7425(d)(1) (emphasis added). Clearly, the language permitting redemption is permissive, and not mandatory, and to interpret it otherwise would run contrary to Congress's intent for the government's tax lien to survive after a sale without notice.

---

[4] While we are not bound by prior district court decisions, we find resolution of a similar issue, in *Bank One v. United States*, helpful in our disposition of this case. In that case, the district court came to the same conclusion regarding § 7425(a)(1) applying to judicial foreclosure sales because it also provides the government's federal tax lien will not be disturbed absent statutory notice. *See* 2007 WL 2350101, at 3-5 (D.Colo. Aug.15, 2007) (unpublished op.) (holding that under 26 U.S.C. § 7425(a)(1) a federal tax lien remains undisturbed without further action by the government and preempts state law because an actual conflict exists between it and Colo.Rev.Stat. § 38-38-506(2) where "[t]here is no viable way to apply both statutes and accomplish the full objective of the federal statute").

Thus, redemption under § 7425(d) is simply one of the options the government may use to enforce a lien. As previously noted, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Cuba*, 527 F.3d at 1065. Thus, in conjunction with the applicable federal statute, legislative history, and our case law, it is clear federal, rather than state, law applies under the circumstances presented here because the government did not receive notice after timely filing its lien.

Undaunted, the Russells rely on *Security Pacific*; *United States v. Colorado*; and *Colorado Property Acquisitions, Inc. v. United States*, 894 F.2d 1173 (10th Cir.1990), in support of their appeal, pointing out that this court ultimately found against the government as the lien holder in those cases. However, in both *Security Pacific* and *United States v. Colorado*, we first determined whether the government's lien was preserved under § 7425(b) before we addressed the remaining issue of whether its junior lien was automatically elevated to priority status over another senior lien holder. To that end, we held § 7425(b) "does not elevate the government's lien but 'merely preserves federal tax liens from being extinguished through sale of the underlying collateral' when property is sold without notice." *Security Pacific*, 897 F.2d at 1058 (quoting *United States v. Colorado*, 872 F.2d at 341). Similarly, in *Colorado Property Acquisitions*, we determined the senior lien holder's lien retained priority over the federal lien on certain property. 894 F.2d at 1176. In this case, no issue was raised as to the junior status of the government's lien, so the disposition of those cases on the lien priority issue is not relevant to resolution of this appeal.

The Russells also argue state law must apply based on both 26 U.S.C. § 6323(a) and (f), which they contend make federal lien priorities subject to a state's priority scheme, and 28 U.S.C. § 2410(a) and (c), which reference both state court jurisdiction and the laws of the situs state. We disagree. Subsections (a) and (f) of 26 U.S.C. § 6323 simply require lien notices to be filed in the state in which the property is situated and are not dispositive of the preemption issue presented here. Subsections (a) and (c) of 28 U.S.C. § 2410, regarding state court jurisdiction and application of state law in civil actions affecting property on which the United States has a lien, are general statements of law which do not affect our conclusion that Congress, in enacting § 7425(b), intended federal law to apply when the government fails to receive notice of a nonjudicial sale.

Applying our de novo review, it is evident under the facts presented that the government filed its tax lien at least thirty days before the sale and did not receive notice of the nonjudicial sale at least twenty-five days in advance. As a consequence, federal law is dispositive of the issue, resulting in the government's tax lien remaining undisturbed and the Russells failing to state a cause of action on which relief can be granted.

III. Conclusion

For these reasons, we **REVERSE** and **REMAND** with instructions for the district court to vacate its decision issued on August 17, 2007, and grant judgment in favor of the government on its motion to dismiss, in accordance with this decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-00456-RPM-BNB

TIMOTHY J. RUSSELL AND ANITA L. RUSSELL,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
AND
HOLLY WILLIAMS,
PUBLIC TRUSTEE OF EL PASO COUNTY,
Defendants.

JUDGMENT ON THE PLEADINGS

On July 10, 2007, the motion of the Defendant, United States of America to dismiss the Plaintiffs' complaint seeking to quiet title to real property under Colorado's omitted party statute C.R.S. § 38-38-506(2)(a) and 26 U.S.C. § 7425(d) came on for hearing before Senior District Judge Richard P. Matsch. Plaintiffs, Timothy J. Russell and Anita L. Russell ("Plaintiffs") appeared by Philip J. Giacinti, Jr., Procopio, Cory, Hargreaves & Savitch LLP and Defendant, United States of America ("U.S.") appeared by Philip Blondin, Deputy U.S. Attorney. The Public Trustee of El Paso County filed her disclaimer on March 15, 2007.

The Court having read the motion and Plaintiffs' opposition and heard argument in favor of and opposed to Defendant's motion to dismiss. The Court, further inquired of Plaintiffs and Defendant if there

was any dispute as to the facts alleged by Plaintiffs in their complaint. Both Plaintiffs, by counsel, and Defendant, by counsel, represented to the Court that there was no dispute as to the facts as alleged in Plaintiffs' complaint.

The Court, being fully advised, entered its minute order of July 10, 2007 denying Defendant's motion to dismiss Plaintiffs' complaint and granting Plaintiffs' judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c).

Plaintiffs having complied with the Court's Order of July 10, 2007, and submitted their affidavit of counsel providing the amount necessary for Defendant, U.S. to redeem Paisley Drive under C.R.S. § 38-38-506(2)(a) and 26 U.S.C. § 7425(d), and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Pursuant to Colorado Revised Statute § 38-38-506(2)(a) and 26 U.S.C. § 7425, the minimum the United States must pay to Plaintiffs to redeem:

> Lot 12, Stonecliff Filing No. 6, in the City of Colorado Springs, County of El Paso, State of Colorado according to the plat thereof recorded May 17, 2001 under Reception No. 2010065192 and as amended in surveyors statements recorded March 7, 2002 under Reception Nos. 202038009 and 202038010

commonly known as 560 Paisley Drive, Colorado Springs, Colorado ("Paisley Drive") is $710,959.42 together with per diem accrual thereon after August 17, 2007 at $103.73 through date of redemption.

2. Defendant, United States, shall have under 26 U.S.C. § 7425(d) and 28 U.S.C. § 2410(c) have one

hundred twenty days (120) from date of entry of this judgment to redeem Paisley Drive.

3. Should Defendant, United States, not redeem Paisley Drive, as set forth in this judgment, title to Paisley Drive is quieted in Plaintiffs free and clear of any claim of lien by Defendant, United States of America.

4. This judgment may be recorded in the chain of title to Paisley Drive.

Dated: August 17th, 2007

/s/ RICHARD P. MATSCH
Richard P. Matsch
Senior District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Date:	July 10, 2007
Courtroom Deputy:	J. Chris Smith
FTR Technician:	Kathy Terasaki

Civil Action No. 07-cv-00456-RPM

TIMOTHY J. RUSSELL and ANITA L. RUSSELL, — Philip J. Giacinti, Jr.

Plaintiffs,

v.

UNITED STATES OF AMERICA and HOLLY WILLIAMS, Public Trustee of El Paso County, — Philip Blondin

Defendants.

COURTROOM MINUTES

Hearing on Motion to Dismiss

3:30 p.m. **Court in session.**

Court's preliminary remarks and its understanding of the case.

3:34 p.m. Argument by Mr. Blondin.

3:46 p.m.	Argument by Mr. Giacinti.
3:49 p.m.	Rebuttal argument by Mr. Blondin.
ORDERED:	**United States' Motion to Dismiss Plaintiffs' Complaint, filed May 4, 2007 [4], is denied.**
ORDERED:	**Judgment on the pleading announced.**
ORDERED:	**Plaintiff shall submit an affidavit with respect to redemption amount.**
3:52 p.m.	**Court in recess.**

Hearing concluded. Total Time: 22 min.

STATUTORY PROVISIONS INVOLVED

1. Section 6323 of the Internal Revenue Code, 26 U.S.C. § 6323, provides in relevant part:

§ 6323. Validity and priority against certain persons

(a) Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors. – The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

* * * * *

(f) Place for filing notice; form. –

(1) Place for filing. – The notice referred to in subsection (a) shall be filed –

(A) Under State laws. –

(i) Real property. – In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal property. – In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated, except that State law merely conforming to or reenacting Federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such State; or

(B) With clerk of district court. – In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) With Recorder of Deeds of the District of Columbia. – In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(2) Situs of property subject to lien. – For purposes of paragraphs (1) and (4), property shall be deemed to be situated –

(A) Real property. – In the case of real property, at its physical location; or

(B) Personal property. – In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.

For purposes of paragraph (2)(B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

(3) Form. – The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

(4) Indexing required with respect to certain real property. – In the case of real property, if –

(A) under the laws of the State in which the real property is located, a deed is not valid as against a purchaser of the property who (at the time of purchase) does not have actual notice or knowledge of the existence of such deed unless the fact of filing of such deed has been entered and recorded in a public index at the place of filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed, and

(B) there is maintained (at the applicable office under paragraph (1)) an adequate system for the public indexing of Federal tax liens,

then the notice of lien referred to in subsection (a) shall not be treated as meeting the filing requirements under paragraph (1) unless the fact of filing is entered and recorded in the index referred to in subparagraph (B) in such a manner that a reasonable inspection of the index will reveal the existence of the lien.

(5) National filing systems. – The filing of a notice of lien shall be governed solely by this title and shall not be subject to any other Federal law establishing a place or places for the filing of liens or encumbrances under a national filing system.

* * * * *

2. Section 7425 of the Internal Revenue Code, 26 U.S.C. § 7425, provides:

§ 7425. Discharge of liens

(a) Judicial proceedings. – If the United States is not joined as a party, a judgment in any civil action or suit described in subsection (a) of section 2410 of title 28 of the United States Code, or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title –

(1) shall be made subject to and without disturbing the lien of the United States, if notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced, or

(2) shall have the same effect with respect to the discharge or divestment of such lien of the United States as may be provided with respect to such matters by the local law of the place where such property is situated, if no notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced or if the law makes no provision for such filing.

If a judicial sale of property pursuant to a judgment in any civil action or suit to which the United States is not a party discharges a lien of the United States arising under the provisions of this title, the United States may claim, with the same priority as its lien had against the property sold, the proceeds (exclusive of costs) of such sale at any time before the distribution of such proceeds is ordered.

(b) Other sales. – Notwithstanding subsection (a) sale of property on which the United States has or claims a lien, or a title derived from enforcement of a

lien, under the provisions of this title, made pursuant to an instrument creating a lien on such property, pursuant to a confession of judgment on the obligation secured by such an instrument, or pursuant to a nonjudicial sale under a statutory lien on such property –

(1) shall, except as otherwise provided, be made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or recording more than 30 days before such sale and the United States is not given notice of such sale in the manner prescribed in subsection (c)(1); or

(2) shall have the same effect with respect to the discharge or divestment of such lien or such title of the United States, as may be provided with respect to such matters by the local law of the place where such property is situated, if –

(A) notice of such lien or such title was not filed or recorded in the place provided by law for such filing more than 30 days before such sale,

(B) the law makes no provision for such filing, or

(C) notice of such sale is given in the manner prescribed in subsection (c)(1).

(c) Special rules. –

(1) Notice of sale. – Notice of a sale to which subsection (b) applies shall be given (in accordance with regulations prescribed by the Secretary) in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary.

(2) Consent to sale. – Notwithstanding the notice requirement of subsection (b)(2)(C), a sale described in subsection (b) of property shall discharge or divest such property of the lien or title of the United States if the United States consents to the sale of such property free of such lien or title.

(3) Sale of perishable goods. – Notwithstanding the notice requirement of subsection (b)(2)(C), a sale described in subsection (b) of property liable to perish or become greatly reduced in price or value by keeping, or which cannot be kept without great expense, shall discharge or divest such property of the lien or title of the United States if notice of such sale is given (in accordance with regulations prescribed by the Secretary) in writing, by registered or certified mail or by personal service, to the Secretary before such sale. The proceeds (exclusive of costs) of such sale shall be held as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the property sold, for not less than 30 days after the date of such sale.

(4) Forfeitures of land sales contracts. – For purposes of subsection (b), a sale of property includes any forfeiture of a land sales contract.

(d) Redemption by United States. –

(1) Right to redeem. – In the case of a sale of real property to which subsection (b) applies to satisfy a lien prior to that of the United States, the Secretary may redeem such property within the period of 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer.

(2) Amount to be paid. – In any case in which the United States redeems real property pursuant to paragraph (1), the amount to be paid for such property shall be the amount prescribed by subsection (d) of section 2410 of title 28 of the United States Code.

(3) Certificate of redemption. –

(A) In general. – In any case in which real property is redeemed by the United States pursuant to this subsection, the Secretary shall apply to the officer designated by local law, if any, for the documents necessary to evidence the fact of redemption and to record title to such property in the name of the United States. If no such officer is designated by local law or if such officer fails to issue such documents, the Secretary shall execute a certificate of redemption therefor.

(B) Filing. – The Secretary shall, without delay, cause such documents or certificate to be duly recorded in the proper registry of deeds. If the State in which the real property redeemed by the United States is situated has not by law designated an office in which such certificate may be recorded, the Secretary shall file such certificate in the office of the clerk of the United States district court for the judicial district in which such property is situated.

(C) Effect. – A certificate of redemption executed by the Secretary shall constitute prima facie evidence of the regularity of such redemption and shall, when recorded, transfer to the United States all the rights, title, and interest in and to such property acquired by the person from whom the United States redeems such property by virtue of the sale of such property.

3. Section 2410 of Title 28, United States Code, provides:

§ 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter –

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United

States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k), and subsection (d) of section 3720 of title 38 of the United States Code, the right to redeem does not arise, there shall be no right of

redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises. In any case where the United States is a bidder at the judicial sale, it may credit the amount determined to be due it against the amount it bids at such sales.

(d) In any case in which the United States redeems real property under this section or section 7425 of the Internal Revenue Code of 1986, the amount to be paid for such property shall be the sum of –

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),

(2) interest on the amount paid (as determined under paragraph (1)) at 6 percent per annum from the date of such sale, and

(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.

(e) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer may issue a certificate releasing the property from such lien.

4. Colorado Revised Statutes Annotated § 38-38-501 provides:

38-38-501. Title vests upon expiration of redemption periods – confirmation deed.

Upon the expiration of all redemption periods allowed to all lienors entitled to redeem under part 3 of this article or, if there are no redemption periods, upon the close of the officer's business day eight business days after the sale, title to the property sold shall vest in the holder of the certificate of purchase or in the holder of the last certificate of redemption in the case of redemption. Subject to the provisions of sections 38-38-506 and 38-41-212(2), such title shall be free and clear of all liens and encumbrances junior to the lien foreclosed. No less than fifteen business days after the date of sale or, if later, the expiration of all redemption periods and the receipt of all statutory fees and costs, the officer shall execute and record a confirmation deed pursuant to section 38-38-502 or 38-38-503 to the holder of the certificate of purchase or, in the case of redemption, to the holder of the last certificate of redemption confirming the transfer of title to the property. Failure of the officer to execute and record such deed or to record the deed within the time specified shall not affect the validity of the deed or the vesting of title.

5. Colorado Revised Statutes Annotated § 38-38-506 provides:

38-38-506. Omitted parties – definitions.

(1) As used in this section, "omitted party" means any person who:

(a) Prior to the recording of the notice of election and demand or lis pendens, has either acquired a record interest in the property or has obtained a valid possessory interest and is in actual possession of the property, which interest is junior to the deed of trust or other lien being foreclosed and would otherwise be extinguished by the foreclosure; and

(b) Is not included as a party defendant in a judicial foreclosure action or, if included, is not served with process, or is not served with notice of levy or seizure pursuant to section 13-55-102, C.R.S., or is not notified pursuant to section 38-38-103 of a sale, or is not notified in connection with the legal proceedings contemplated by section 38-38-105.

(2)(a) The interest of an omitted party in the property that is the subject of a sale may be terminated if the omitted party, in a civil action commenced at any time by any interested person as defined in paragraph (c) of this subsection (2), is afforded rights of cure if the omitted party would have been entitled to cure pursuant to section 38-38-104, or is afforded redemption rights if the omitted party would have been entitled to redeem pursuant to section 38-38-302, upon such terms as the court may deem equitable under the circumstances, which terms shall not, however, be more favorable than the person's statutory rights. The court shall give full consideration to whether the omitted party was given or had actual

notice or knowledge of the foreclosure and was given an opportunity to exercise statutory rights to cure or redeem.

(b) For purposes of this section, the lien that is the subject of the sale shall not be extinguished by merger with the title to the property acquired pursuant to section 38-38-501 until the interest of any omitted party has been affirmed pursuant to subsection (3) of this section or has been terminated as provided in paragraph (a) of this subsection (2), or by operation of law.

(c) As used in this section, "interested person" means the holder of the evidence of debt being foreclosed, a holder of a certificate of purchase or certificate of redemption issued pursuant to section 38-38-401 or 38-38-402, or an owner of the property pursuant to section 38-38-501 or a person claiming by, through, or under such holder or owner.

(3) If an interested person files with the officer at any time a document affirming an omitted party's interest in the property, subject to the terms, conditions, and provisions of the recorded instrument from which such omitted party's interest is derived, or in the case of an omitted party that is a lessee, subject to the terms and conditions of the lease, whether written or oral, the interest of such omitted party in the property shall not be affected by the foreclosure, and such omitted party shall have no right to cure or redeem.

(4) (Deleted by amendment, L. 2006, p. 1476, § 31; L. 2007, p. 1849, § 27, effective January 1, 2008.)

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

March 11, 2009

Mr. Aaron M. Panner
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Timothy J. Russell, et ux.
v. United States
Application No. 08A792

Dear Mr. Panner:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on March 11, 2009 extended the time to and including April 18, 2009.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ SANDY SPAGNOLO

Sandy Spagnolo
Case Analyst

[attached notification list omitted]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

April 6, 2009

Mr. Aaron M. Panner
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Timothy J. Russell, et ux.
v. United States
Application No. 08A792

Dear Mr. Panner:

The application for a further extension of time in the above-entitled case has been presented to Justice Breyer, who on April 6, 2009 extended the time to and including May 18, 2009.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ SANDY SPAGNOLO

Sandy Spagnolo
Case Analyst

[attached notification list omitted]

(3)

No. 08-1437

In the Supreme Court of the United States

TIMOTHY J. RUSSELL AND ANITA L. RUSSELL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN A. DICICCO
Acting Assistant Attorney General
BRUCE R. ELLISEN
PATRICK J. URDA
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 26 U.S.C. 7425(b)(1), which provides for the preservation of a federal tax lien when the United States does not receive notice of a nonjudicial sale of property subject to the lien, bars the post-sale extinguishment of the lien under state law.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 2
Argument 4
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Burton v. *Smith*, 38 U.S. (13 Pet.) 464 (1839) 5
Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) 4
First Am. Title Ins. Co. v. *United States*, 848 F.2d 969 (9th Cir. 1988) 8, 9, 10
Orme v. *United States*, 269 F.3d 991 (9th Cir. 2001) 6
Security Pac. Mortgage Corp. v. *Choate*, 897 F.2d 1057 (10th Cir. 1990) 4, 6, 9
Tompkins v. *United States*, 946 F.2d 817 (11th Cir. 1991) 8, 9, 10
United States v. *Bess*, 357 U.S. 51 (1958) 5
United States v. *Williams*, 514 U.S. 527 (1995) 7

Statutes:

26 U.S.C. 6321 5
26 U.S.C. 6322 ..... 3, 5, 7
26 U.S.C. 7425 ..... 6, 7, 9
26 U.S.C. 7425(b) 4, 6, 9
26 U.S.C. 7425(b)(1) 3, 5, 6, 9
26 U.S.C. 7425(b)(2) 5

Statutes—Continued: Page

26 U.S.C. 7425(c)(1) 3, 5
26 U.S.C. 7425(d) 3
28 U.S.C. 2410 7
28 U.S.C. 2410(a) 7
28 U.S.C. 2410(c) 7
Colo. Rev. Stat. (2006):
§ 38-38-506 ..... 2, 3, 4, 5, 6
§ 38-38-506(2)(a) 3

Miscellaneous:

H.R. Rep. No. 1884, 89th Cong., 2d Sess. (1966) 8
S. Rep. No. 1708, 89th Cong., 2d Sess. (1966) 8

In the Supreme Court of the United States

No. 08-1437

TIMOTHY J. RUSSELL AND ANITA L. RUSSELL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 551 F.3d 1174.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. On March 11, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including April 18, 2009. On April 6, 2009, Justice Breyer further extended the time to May 18, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 2003, Ashcroft Homes, Inc., obtained a construction loan in the amount of $506,400 from U.S. Bank. The loan was secured with a deed of trust to certain real property in Colorado. In July 2004, the Internal Revenue Service (IRS) filed a notice of federal tax lien against Ashcroft Homes in the amount of $160,353.09, and the county clerk recorded the lien. On October 24, 2004, U.S. Bank assigned the deed of trust to Timber Creek Holdings, L.P. Pet. App. 2a.

Ashcroft Homes defaulted on the U.S. Bank loan, and Timber Creek commenced foreclosure proceedings in February 2005. On April 13, 2005, the Public Trustee of El Paso County, Colorado, conducted a foreclosure sale at which Timber Creek purchased the property for $630,987.94. The United States was not provided with notice of the foreclosure sale. In November 2005, Timber Creek sold the property to petitioners. Pet. App. 2a.

2. In March 2007, petitioners filed a quiet-title action against the United States in the United States District Court for the District of Colorado. Pet. App. 2a. Petitioners noted that, under Colorado law, Colo. Rev. Stat. § 38-38-506 (2006), the interest of an "omitted party" who is not notified of a foreclosure sale may be terminated if the party is given a right to redeem, or purchase, the property. Petitioners asserted that the United States was such an "omitted party," and that the government was therefore required either to redeem or to forfeit its tax lien. Compl. ¶¶ 5, 8.

The government moved to dismiss the suit as barred by federal law. It explained that, under federal law, if property on which the United States has a lien is sold at a nonjudicial sale, the tax lien remains attached to the property where, as here, the United States had filed a

notice of the lien at least 30 days before the sale and did not receive timely notice of the sale. Gov't Mem. in Support of Mot. to Dismiss 3-4; see 26 U.S.C. 7425(b)(1) and (c)(1). The government also observed that, after a federal tax lien arises, federal law provides that the lien "continues to remain attached unless the liability for the underlying federal tax assessment is satisfied or becomes unenforceable." Gov't Mem. in Support of Mot. to Dismiss 4 (citing 26 U.S.C. 6322). The government argued that, to the extent Colorado law would otherwise have the effect of extinguishing a federal tax lien that remained attached to the property under federal law, Colorado law was inconsistent with federal law and could not control. *Id.* at 5.

The district court denied the motion to dismiss and subsequently entered judgment in favor of petitioners. Pet. App. 14a-16a. The court held that, under Colorado law, and pursuant to federal law governing the United States' right of redemption, the United States had 120 days to pay $710,959.42 to redeem the property. *Id.* at 15a-16a (citing Colo. Rev. Stat. § 38-38-506(2)(a), and 26 U.S.C. 7425(d)). The court further held that, if the United States failed to redeem, title to the property would be quieted in petitioners "free and clear of any claim of lien" by the United States. *Id.* at 16a.

3. The court of appeals reversed. Pet. App. 1a-13a. The court of appeals agreed with the government that federal tax law preempts any application of Colo. Rev. Stat. § 38-38-506 that would require the United States to redeem or forfeit its federal tax lien when it did not receive the required notice of a nonjudicial sale. Relying on the text and legislative history of 26 U.S.C. 7425(b)(1), the court found it "clear" that "Congress intended federal law to 'occupy the field'" with respect to

the preservation of tax liens when property is sold without proper notice to the United States. Pet. App. 8a-10a. The court concluded on that basis that Section 7425(b) "dictates the method for discharging a tax lien when the underlying property is sold." *Id.* at 10a (quoting *Security Pac. Mortgage Corp.* v. *Choate*, 897 F.2d 1057, 1058 (10th Cir. 1990)). The court further held that "Colorado law is naturally preempted where notice is not given to the government as a lien holder" because "the remedy in Colo. Rev. Stat. §§ 38-38-501 and 38-38-506, which requires extinguishment of the government's lien if it fails to redeem the property, conflicts with the remedy provided in § 7425(b), which preserves the government's lien." *Id.* at 10a-11a.

ARGUMENT

Petitioners contend (Pet. 16-26) that the federal tax lien on their property must be extinguished as a matter of state law unless the United States chooses to exercise a state-law right of redemption. The court of appeals correctly rejected that contention as inconsistent with federal tax law, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the Colorado omitted-party statute, Colo. Rev. Stat. § 38-38-506, as applied to the federal tax lien at issue in this case, conflicts with federal tax law and is therefore preempted. See, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute.").

A federal tax lien arises in favor of the United States if "any person liable to pay any tax neglects or refuses

to pay the same after demand," and the lien attaches to "all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. 6321. Once a tax lien attaches to a taxpayer's property, it generally remains attached "until the liability for the amount so assessed * * * is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. 6322. A transfer of the property after a tax lien has attached "does not affect the lien, for 'it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere.'" *United States* v. *Bess*, 357 U.S. 51, 57 (1958) (quoting *Burton* v. *Smith*, 38 U.S. (13 Pet.) 464, 483 (1839)).

If property as to which the government has or claims a lien is sold in a nonjudicial sale, and proper notice was given to the government, federal law provides that state law governs the discharge or divestiture of the tax lien. 26 U.S.C. 7425(b)(2). But if no such notice is given, then the sale is "made subject to and without disturbing such lien." 26 U.S.C. 7425(b)(1); see 26 U.S.C. 7425(c)(1).

Under Colorado law, if a party has a recorded interest in foreclosed property but is not notified of the public trustee's foreclosure sale, that party's interests may be terminated so long as the party is afforded rights of cure or redemption. Colo. Rev. Stat. § 38-38-506 (2006). That statute thus requires a so-called omitted party to make one of two choices: either exercise its right to redeem the property, or forfeit its interest in the property.

The court of appeals correctly concluded that Colo. Rev. Stat. § 38-38-506, "which requires extinguishment of the government's lien if it fails to redeem the property, conflicts with the remedy provided in § 7425(b), which preserves the government's lien." Pet. App. 11a. Federal law thus bars Colorado law from operating to

terminate the federal tax lien on petitioners' property. *Id.* at 13a.

2. a. Petitioners contend (Pet. 18-20) that the court of appeals erred in concluding that Congress intended to "occupy the field" with respect to the discharge of federal tax liens. Although the court noted that "Congress intended federal law to 'occupy the field' in resolving * * * federal tax lien issues" related to Section 7425, it did so in the course of explaining that Section 7425(b) "dictates the method for discharging a tax lien when the underlying property is sold." Pet. App. 10a (quoting *Security Pac. Mortgage Corp.* v. *Choate*, 897 F.2d 1057, 1058 (10th Cir. 1990)). That observation is both correct and unremarkable. See *Orme* v. *United States*, 269 F.3d 991, 994 (9th Cir. 2001) (in enacting Section 7425(b), "Congress has spoken clearly on the divestiture of federal tax liens in sales of property"). And as petitioners themselves acknowledge, Section 7425 specifies that "a lien is *not* to be discharged * * * when the government has not received notice of a foreclosure." Pet. 19.

b. Petitioners also contend (Pet. 21-22) that Colo. Rev. Stat. § 38-38-506 does not conflict with Section 7425(b)(1). Petitioners argue that Section 7425(b)(1) explicitly prohibits discharge of a federal tax lien only at the moment of a nonjudicial sale of which the United States was not notified, and that it does not bar a State from terminating a federal tax lien thereafter. That argument lacks merit. Contrary to petitioners' suggestion (Pet. 21), federal law is not "silent" on the question of post-sale discharges. Rather, federal law provides that a tax lien attached to a taxpayer's property generally remains so attached "until the liability for the amount * * * assessed * * * is satisfied or becomes

unenforceable by reason of lapse of time." 26 U.S.C. 6322.

There is likewise no merit to petitioners' suggestion (Pet. 21) that 28 U.S.C. 2410 contemplates post-sale discharges of federal tax liens under state law. Section 2410 authorizes suit against the United States to, *inter alia*, quiet title to property on which the United States claims a lien, or to foreclose a mortgage or other lien on such property. 28 U.S.C. 2410(a). Section 2410 also provides that a judgment in such an action "shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated." 28 U.S.C. 2410(c). But as the court of appeals correctly explained, those general provisions authorizing suit against the United States "do not affect [the] conclusion that Congress, in enacting § 7425(b), intended federal law to apply when the government fails to receive notice of a nonjudicial sale." Pet. App. 13a.*

Petitioners' reliance (Pet. 22) on the legislative history of Section 7425 is also misplaced. The congressional committee reports explained:

> Where foreclosures covered by this provision are made without proper notice to the Government, the bill provides that this does not affect the Govern-

---

* Petitioners contend (Pet. 19-20) that, in its brief in *United States* v. *Williams*, 514 U.S. 527 (1995), the government "acknowledged that quiet title suits brought under [Section 2410] may be used to discharge federal tax liens pursuant to state law." The government's brief in that case, however, merely stated that "[t]he procedural validity of [a] federal tax lien, but not the validity of the underlying assessment, may be adjudicated in [a Section 2410 quiet-title] action." U.S. Brief at 17, *Williams*, *supra* (No. 94-395).

> ment's claim under a tax lien (as where the Government is not joined in a judicial foreclosure). In these cases, the Government's claim continues against the property into the hands of a third party.

S. Rep. No. 1708, 89th Cong., 2d Sess. 28 (1966); H.R. Rep. No. 1884, 89th Cong., 2d Sess. 26 (1966). The reports did not suggest that Congress intended to permit States to extinguish the government's claim against the property in the wake of an unnoticed nonjudicial sale.

c. Finally, petitioners observe (Pet. 22-25) that "Colorado's omitted-parties statute affords the government the same rights it would have been afforded if it had notice of the sale." But that does not mean that the State may now put the government to the choice of redeeming the property or forfeiting its federal tax lien, even though the government was not informed of the sale before it was completed. See *Tompkins* v. *United States*, 946 F.2d 817, 821 (11th Cir. 1991) ("The survival * * * of inferior federal tax liens is the penalty Congress intended to impose on senior lienholders who fail to give the presale notice prescribed by section 7425. This penalty allows the IRS to maintain the status quo of its lien, as well as to benefit from future increases in the value of the property.") (citing *First Am. Title Ins. Co.* v. *United States*, 848 F.2d 969, 972-973 (9th Cir. 1988)).

3. Petitioners contend (Pet. 7-15) that this Court's review is warranted to resolve a conflict between the decision below and the decisions of the Ninth and the Eleventh Circuits in *First American Title* and *Tompkins*. That contention lacks merit.

In both *First American Title* and *Tompkins*, the courts ruled that, where a senior lienholder failed to give notice to the government of a nonjudicial sale, Sec-

tion 7425(b)(1) did not preclude the courts from applying an equitable exception to the general rule that a senior lienholder's lien merges into the fee when the lienholder purchases property at a foreclosure sale. *First Am. Title*, 848 F.2d at 971-973; *Tompkins*, 946 F.2d at 819-820. Both courts acknowledged that granting equitable relief would have the effect of preserving the pre-sale priority of the purchaser's lien over a federal tax lien. The courts reasoned that such relief would not conflict with Section 7425, which forbids the discharge of federal tax liens after an unnoticed nonjudicial sale but does not resolve questions of lien priority. *Ibid.*

Those decisions are consistent with the law in the Tenth Circuit. As the court of appeals noted in this case, the Tenth Circuit had also previously concluded that Section 7425(b) does not preclude the application of state-law remedies merely because they would affect the relative priority of a federal tax lien after an unnoticed judicial sale. See Pet. App. 12a; see also, *e.g.*, *Security Pac.*, 897 F.2d at 1058. But as the court further noted, this case presents a different question: namely, whether Section 7425(b) forbids a State from terminating a federal tax lien altogether. See Pet. App. 12a.

Petitioners suggest (Pet. 14-15) that *First American Title* and *Tompkins* nevertheless conflict with the decision below because the courts in those cases determined that Section 7425(b) did not preclude the availability of post-sale relief under state law. But the court of appeals in this case did not hold that Section 7425(b) precludes *all* post-sale relief under state law; it held only that Section 7425(b) precludes post-sale remedies that operate to extinguish a federal tax lien. See Pet. App. 10a-11a. Contrary to petitioners' suggestion (Pet. 13), neither *First American Title* nor *Tompkins* is inconsistent with

that holding. See *First Am. Title*, 848 F.2d at 972-973 (explaining that, in the absence of notice, "the government's liens survive the sale, leaving an encumbrance on the property," and that the preservation of the government's lien "is the penalty that Congress intended to impose on senior lienors" who fail to provide the required notice); accord *Tompkins*, 946 F.2d at 821.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN A. DICICCO
Acting Assistant Attorney General
BRUCE R. ELLISEN
PATRICK J. URDA
Attorneys

AUGUST 2009

Supreme Court, U.S.
FILED
SEP - 2 2009
OFFICE OF THE CLERK

(4)

No. 08-1437

IN THE
Supreme Court of the United States

TIMOTHY J. RUSSELL AND ANITA L. RUSSELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

AARON M. PANNER
Counsel of Record
MICHAEL J. BURSTEIN
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

September 2, 2009

TABLE OF CONTENTS

Pag

TABLE OF AUTHORITIES ii

ARGUMENT:

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE NINTH AND ELEVENTH CIRCUITS 2

II. SECTION 7425(b) DOES NOT DISPLACE STATE POST-SALE REMEDIES THAT AFFORD OMITTED JUNIOR LIENHOLDERS THE OPPORTUNITY TO VINDICATE THEIR INTERESTS 6

III. THIS CASE PRESENTS AN ISSUE OF UNDISPUTED IMPORTANCE 11

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

American Land Co. v. Zeiss, 219 U.S. 47 (1911)..... 8

Bates v. Dow AgroSciences LLC, 544 U.S. 431 (2005) 6

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 8

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 3

First Am. Title Ins. Co. v. United States, 848 F.2d 969 (9th Cir. 1988) 2, 3, 4, 5, 8, 10

Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991) 8

Orme v. United States, 269 F.3d 991 (9th Cir. 2001)..... 6

Security Pac. Mortgage Corp. v. Choate, 897 F.2d 1057 (10th Cir. 1990) 2

Tompkins v. United States, 946 F.2d 817 (11th Cir. 1991) 2, 4, 5, 10

United States v. Brosnan, 363 U.S. 237 (1960) 8, 9, 10

United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 10

United States v. Standard Oil Co., 332 U.S. 301 (1947) 11

STATUTES

Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125 8

Internal Revenue Code (26 U.S.C.):

§ 6322 ..... 9, 10

§ 7425 ..... 2, 3, 6, 10

§ 7425(b) 6

§ 7425(b)(1) 1, 2, 4, 5, 6, 7, 9, 10, 11

Internal Revenue Code of 1954, ch. 736, § 6322, 68A Stat. 3, 779 10

28 U.S.C. § 2410 7

Colo. Rev. Stat. Ann.:

§ 38-38-302 ..... 4, 10

§ 38-38-501 ..... 4, 10

§ 38-38-506 ..... 1, 10

§ 38-38-506(2) 6, 7

§ 38-38-506(2)(a) 4, 10

§ 38-38-506(2)(b) 4

LEGISLATIVE MATERIALS

S. Rep. No. 89-1708 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 3722 9

OTHER MATERIALS

Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* (5th ed. 2007) 3, 4

The Tenth Circuit's decision holds that § 7425(b)(1) of the Internal Revenue Code – which provides that a federal tax lien survives a nonjudicial forcclosure sale in cases where the government does not receive proper notice of the sale – also preempts *post-sale* remedies (here, the Colorado "omitted parties" statute, Colo. Rev. Stat. Ann. § 38-38-506) that allow a good-faith purchaser to cure the notice defect. In so construing the provision, the court created a conflict with decisions of the Ninth and Eleventh Circuits that uphold functionally identical state post-sale remedies. The government would deny the conflict by arguing that the Ninth and Eleventh Circuit decisions are limited to "questions of lien priority," Opp. 9, but that mischaracterizes those decisions, which address the validity of post-sale equitable remedies that allow a purchaser to extinguish a federal tax lien. If such equitable remedies are consistent with federal law – and they are, as discussed below – so is the Colorado statute at issue here.

Review is further warranted because the Tenth Circuit's decision is both wrong and unfair – points that the government hardly contests. The decision is wrong because § 7245(b)(1), by its terms, addresses only the effect of a nonjudicial foreclosure sale made without notice; it does not address the validity of post-sale remedies designed to cure notice defects. Particularly in light of this Court's governing principles of statutory construction – which mandate the preservation of state-law property rules in the absence of a plain conflict – the Tenth Circuit's holding that the Internal Revenue Code "occup[ies] the field" (Pet. App. 10a) is indefensible. And the decision is unfair because it results in a windfall to the government – placing the government in a *better* position

than it would have been in had it received notice of the sale in the first instance, a point the government concedes – and because it leaves innocent parties without any legal remedy to cure a notice defect in an otherwise valid nonjudicial foreclosure sale.

The government does not gainsay the national importance of the issue raised in this petition. This Court should grant the petition and reverse the Tenth Circuit's judgment below.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE NINTH AND ELEVENTH CIRCUITS

As petitioners explained (at 8-11), the Ninth and Eleventh Circuits each have held that § 7425(b)(1) preserves the government's tax lien when the government does not receive notice of a foreclosure sale, but does not preclude the application of post-sale remedies that lead to discharge of the lien after the notice defect is cured. In particular, those courts have held that "Congress intended *only* to shield the government's junior liens from extinction so the government could protect its interests at a later date," *First Am. Title Ins. Co. v. United States*, 848 F.2d 969, 972 (9th Cir. 1988) (emphasis added), and that, "[i]f any pre-emptive effect was intended by Congress, . . . it is limited to pre-emption of local laws which would completely discharge the government's junior interest without clear notice to the government," *Tompkins v. United States*, 946 F.2d 817, 820 (11th Cir. 1991). By contrast, the Tenth Circuit held that § 7425 "'dictates the method for discharging a tax lien when the underlying property is sold,'" Pet. App. 9a (quoting *Security Pac. Mortgage Corp. v. Choate*, 897 F.2d 1057, 1058 (10th Cir. 1990)), and that "Congress intended federal law to 'occupy the

field'" concerning discharge of federal liens in foreclosure sales, *id.* at 10a (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000)).

The United States offers three responses in an effort to muddy the conflict. None is persuasive.

First, the government suggests (at 9) that the Ninth and Eleventh Circuit cases are distinguishable because they involved a different post-sale remedy from Colorado's omitted-parties statute. In the government's view, the latter "operate[s] to extinguish a federal tax lien," *id.*, while the former does not. To the contrary, the equitable lien remedy that the Ninth and Eleventh Circuits held undisturbed by § 7425 is functionally identical to Colorado's omitted-parties statute. *See* Pet. 13-14. In most states, when a senior lienholder forecloses on property and takes possession at a foreclosure sale, the lien and the title are said to "merge." That is, the "mortgagee's lien is extinguished," and the mortgagee becomes the owner of the property rather than a senior lienholder. *First Am. Title*, 848 F.2d at 971. The equitable lien doctrine "revive[s]" the senior lien for the limited purpose of re-foreclosing the mortgage and terminating any junior interests omitted from the initial foreclosure proceeding. Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 7.15, at 617 (5th ed. 2007). The omitted junior lienholder in that circumstance may redeem the property or, in the vast majority of cases, see its interest terminated in the re-foreclosure. *See id.* Colorado's omitted-parties statute provides a functionally equivalent remedy: upon discovery of the omitted junior lienholder, the purchaser of the property (or, as in this case, the subsequent purchaser) at foreclosure may bring an action in which the omitted junior lienholder "is

afforded redemption rights." Colo. Rev. Stat. Ann. § 38-38-506(2)(a). If the omitted party chooses not to exercise those rights, its interest is terminated. *See id.*

In each case, the state places the junior and senior lienholders in the same position they were in prior to the foreclosure sale. An equitable lien allows the mortgage to be re-foreclosed, triggering the junior lienholder's statutory right of redemption. *See id.* §§ 38-38-302, 38-38-501. Colorado's omitted-parties statute replicates the redemption right that the junior lienholder would have had if it had been included in the initial sale. *See id.* § 38-38-506(2)(a). The two remedies are thus complementary; indeed, as petitioners pointed out (at 14 n.6), Colorado codifies them in the same statute. *See* Colo. Rev. Stat. Ann. § 38-38-506(2)(a), (b). Commentators similarly discuss the two remedies in tandem. *See, e.g.*, Nelson & Whitman § 7.15, at 616-19.

Second, and relatedly, the government argues (at 9) that *First American Title* and *Tompkins* involved "questions of lien priority" rather than "post-sale remedies that operate to extinguish a federal tax lien." That is incorrect. As described above, the equitable lien doctrine does not merely establish priority among competing lienholders; it revives a lien that had been extinguished for the purpose of terminating a junior interest even after the sale has been completed.

Both the *First American Title* and *Tompkins* courts thus recognized that they were *not* addressing an issue of priority, but rather the question whether § 7425(b)(1) precluded the state from reviving the senior interest. In *First American Title*, the Ninth Circuit expressly noted that, "as to priority issues,

state equitable principles do not apply." 848 F.2d at 972. Instead, the court applied state law because the case "deal[t] with a *property* issue," namely, "whether [the senior] lien survived the sale." *Id.* (emphasis added). Similarly, the *Tompkins* court stated that, "[b]efore we can evaluate the priority of the liens, we must first determine Tompkins' post-foreclosure sale property rights." 946 F.2d at 819. Each court held that § 7425(b)(1) did not preempt the application of state property law to provide an equitable remedy to the senior lienholder – *despite the government's arguments to the contrary*. *See id.* at 820-21; *First Am. Title*, 848 F.2d at 972-73.

Third, the government argues (at 9) that the law of the Tenth Circuit is consistent with that of the Ninth and Eleventh Circuits because the Tenth Circuit previously upheld the application of Colorado's equitable lien doctrine. But, in the decision below, the Tenth Circuit distinguished those prior cases as addressing only the *priority* of liens – that is, the question whether the government's "junior lien was automatically elevated to priority status over another senior lien holder." Pet. App. 12a. As described above, that understanding is incorrect – in fact, the doctrine allows for the revival of an otherwise-extinguished property right precisely for the purpose of curing a defect in notice – and markedly different from the manner in which the Ninth and Eleventh Circuits analyzed the issue. At most, the existence of a prior Tenth Circuit decision suggests the depth of confusion in the law of that circuit; it does not lessen the importance of the conflict.

II. SECTION 7425(b) DOES NOT DISPLACE STATE POST-SALE REMEDIES THAT AFFORD OMITTED JUNIOR LIENHOLDERS THE OPPORTUNITY TO VINDICATE THEIR INTERESTS

A. The government contends (at 6) that § 7425 occupies the field with respect to the disposition of federal tax liens following sales of real property, calling the Tenth Circuit's similar conclusion "correct and unremarkable." But neither the government nor the court below provides *any* support for such a broad scope of federal preemption,[1] which clashes with this Court's principles of statutory interpretation. *See, e.g., Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 441-42 (2005) (noting that "field preemption" applies where a statute is "sufficiently comprehensive . . . to justify an inference that Congress had occupied the field to the exclusion of the States") (internal quotation marks omitted).

B. The government further argues that a conflict arises between 26 U.S.C. § 7425(b)(1) and Colorado Revised Statutes Annotated § 38-38-506(2) because Colorado's statute "'requires extinguishment of the government's lien if it fails to redeem the property,'" while § 7425(b) "'preserves the government's lien.'" Opp. 5 (quoting Pet. App. 11a). There is no such conflict.

---

[1] The United States cites *Orme v. United States*, 269 F.3d 991 (9th Cir. 2001), for the proposition that "'Congress has spoken clearly on the divestiture of federal tax liens in sales of property.'" Opp. 6 (quoting *Orme*, 269 F.3d at 994). But the issue in that case was whether § 7425(b) applied at all to the forfeiture of a land sales contract. *See* 269 F.3d at 995-96. The plaintiffs in that case made no argument that any post-sale remedies applied to their title if the government lien remained attached.

1. The government's – and the Tenth Circuit's – analysis is based on a misreading of the statute. As petitioners explained (at 21), § 7425(b)(1) provides that "a sale of property on which the United States has or claims a [tax] lien . . . shall . . . be made subject to and without disturbing such lien" if the government fails to receive timely notice of the sale. 26 U.S.C. § 7425(b)(1). Section 38-38-506(2), on the other hand, provides that "[t]he interest of an omitted party . . . may be terminated if the omitted party, *in a civil action commenced at any time by any interested person* . . . [,] is afforded redemption rights." Colo. Rev. Stat. Ann. § 38-38-506(2)(a) (emphasis added). These two provisions are in no way inconsistent. In this case, for example, the government's lien was *not* extinguished in the unnoticed foreclosure sale. Section 7425(b)(1) was therefore satisfied. Upon discovering the omitted federal tax lien, petitioners brought a subsequent action in which the government was given the opportunity to redeem its interest.[2] Colorado's statute was therefore satisfied. The two remedies are not mutually exclusive.

The claim of conflict depends on reading § 7425(b)(1) to preserve the government's lien *indefinitely* following an unnoticed nonjudicial sale. Indeed, the government argues (at 6) that § 7425(b)(1) not only "prohibits discharge of a federal tax lien . . . at the moment of a nonjudicial sale," but also "bar[s] a State from terminating a federal tax lien thereafter." But § 7425(b)(1) is silent with respect to the *post-sale* remedies that may lead to the extinguishment of federal tax liens that survive unnoticed nonjudicial sales.

---

[2] Section 2410 explicitly authorizes such suits. *See* Pet. 19-20. The government does not contest the point.

This Court presumptively applies state law concerning the disposition of federal liens in the absence of *explicit* congressional directive. *See* Pet. 16-18, 21-22. In *United States v. Brosnan*, 363 U.S. 237 (1960) – a case that the government does not even *cite*, let alone discuss – the Court "adopt[ed] as federal law state law governing divestiture of federal tax liens, except to the extent that Congress may have entered the field." *Id.* at 241. That precedent is consistent with the Court's application of a "presumption that state law should be incorporated into federal common law" "in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). The orderly conduct of foreclosure sales is one such area. As the Court noted in *Brosnan*, "when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law." 363 U.S. at 241-42. "'[T]he security of the titles to real estate'" is "an essential state interest": "the power to ensure that security 'inheres in the very nature of [state] government.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quoting *American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911)) (second alteration in original). As the Ninth Circuit held, "Congress intended *only* to shield the government's junior liens from extinction so the government could protect its interests at a later date." *First Am. Title*, 848 F.2d at 972 (emphasis added). The principle underlying Colorado's omitted-parties statute is entirely consistent with that intent.

Finally, the government misreads the legislative history of the Federal Tax Lien Act of 1966. *See* Opp.

7-8. The congressional committee reports highlight Congress's narrow concern with preventing federal tax liens from being "extinguished . . . under circumstances where it is not possible for the [IRS] to take steps to protect the United States in the collection of its tax revenues." S. Rep. No. 89-1708, at 27 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 3722, 3748; *see* Pet. 22. The additional language that the government quotes from that report – that, in nonjudicial foreclosure sales without notice to the government, "the Government's claim continues against the property into the hands of a third party," S. Rep. No. 89-1708, at 28, *as reprinted in* 1966 U.S.C.C.A.N. 3749 – says the same thing. What it does *not* say is that Congress intended to prevent third parties from availing themselves of state-law remedies to clear their titles *after* the unnoticed sale.

Unable to rely on the text or history of § 7425(b)(1), the government argues that a different section of the Internal Revenue Code – § 6322 – preempts state post-sale remedies. Section 6322 provides that a federal tax lien "shall arise at the time the [tax] assessment is made and shall continue until the liability for the amount so assessed . . . is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. § 6322. That provision cannot bear the preemptive weight the government lays on it. Under the government's reading of that provision, a federal tax lien could *never* be discharged until the taxes were paid or the lien became unenforceable. But this Court reached the opposite conclusion in *Brosnan*, holding that "state law" may "govern[] divestiture of federal

tax liens." 363 U.S. at 241.[3] If § 6322 meant what the government claims, Congress's subsequent enactment of § 7425 to prevent government liens from being discharged without notice would have been unnecessary.

2. Finally, the government concedes that it would suffer no prejudice by the application of § 38-38-506 to the tax liens at issue in this case. *See* Opp. 8. Had the United States been included in the foreclosure sale, it would have had to choose between redeeming the property and seeing its interest terminated. *See* Pet. 25; Colo. Rev. Stat. Ann. §§ 38-38-302, 38-38-501. That is the same choice the government faces under the omitted-parties statute. *See id.* § 38-38-506(2)(a). Yet the government argues that it should be placed not in the *same* position as if it had received notice of the sale, but in a *better* position – that is, the government argues that it is entitled to maintain an encumbrance on the property in question *ad infinitum* as a "penalty" for the lack of notice. Opp. 8. But there is *no* indication that Congress intended § 7425(b)(1) to operate as a "penalty" or to provide a windfall for the government. As the government itself concedes (*id.*), the statute was meant simply to "maintain the status quo of [the] lien" following a sale without notice, *Tompkins*, 946 F.2d at 821, so that the government could "protect its interests at a later date," *First Am. Title*, 848 F.2d at 972; *see also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979) (state-law rules are not displaced when they "'furnish [a] convenient solution[] in no way inconsistent with adequate protection of the federal

---

[3] Section 6322 was effective in identical form at the time of this Court's decision in *Brosnan*. *See* Internal Revenue Code of 1954, ch. 736, § 6322, 68A Stat. 3, 779.

interest[s]'") (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 309 (1947)) (third alteration in original). The government's reading turns § 7245(b)(1) into a "gotcha" statute; there is no basis for concluding that Congress intended any such result.

III. THIS CASE PRESENTS AN ISSUE OF UNDISPUTED IMPORTANCE

The United States does not question the national importance of the issue raised in this case. As petitioners and their *amicus* have detailed, it is of critical importance that foreclosure sales be conducted in an efficient and orderly manner, and that the participants in those sales be afforded mechanisms for obtaining free and clear property titles. *See* Pet. 26-27; Br. of American Land Title Ass'n 20-22. By calling into question the application to federal tax liens of numerous states' post-sale remedies for omitted parties to foreclosure sales, the Tenth Circuit has created confusion and uncertainty in national real estate markets. This Court's review is necessary to ensure that those markets continue to function well in this time of significant economic stress.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

AARON M. PANNER
Counsel of Record
MICHAEL J. BURSTEIN
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

September 2, 2009

(2)

No. 08-1437

FILED
JUN 19 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

TIMOTHY J. RUSSELL AND ANITA L. RUSSELL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SHELDON E. HOCHBERG
Counsel of Record
CHARLES G. COLE
SAAD GUL
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Amicus Curiae American Land Title Association

223499

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	5
I. POST-FORECLOSURE REMEDIES TO ADDRESS OMITTED IRS LIENS ARE NECESSARY TO ASSURE CLEAR TITLES.	5
A. A Major Purpose Of Foreclosure Is To Enable Properties Encumbered With Liens To Be Sold With Clear Titles.	5
B. For Various Reasons Junior Lienholders May Not Receive Notice Of The Foreclosure Sale.	6
C. States Have Developed Various Mechanisms For Preventing Omitted Parties From Clouding The Titles For Unduly Long Periods.	9

Contents

Page

II. THE TENTH CIRCUIT'S DECISION THREATENS ALL STATE POST-FORECLOSURE REMEDIES AFFECTING OMITTED IRS LIENS. 12

A. The Tenth Circuit's Decision Conflicts With This Court's Admonition As To The Clarity With Which Congress Must Speak Before State Laws Affecting Foreclosures Will Be Preempted. 12

B. The Tenth Circuit's Decision Threatens To Undermine All State Law Mechanisms For Addressing Omitted IRS Liens. 15

C. The Tenth Circuit's Decision Provides An Inequitable Advantage To The IRS While Significantly Undermining State Law Remedies Without Explicit Statutory Direction. 18

III. REVIEW IS NEEDED TO PREVENT ADVERSE EFFECTS ON REAL ESTATE MARKETS. 20

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Page

CASES

Am. Land Co. v. Zeiss,
219 U.S. 47 (1911) 19

BFP v. Resolution Trust Corp.,
511 U.S. 531 (1994) ..... *passim*

Brightwell v. United States,
805 F. Supp. 1464 (S.D. Ind. 1992) 9

Citicorp Mtge. Inc., v. Pessin,
570 A.2d 481 (N.J. Super. Ct. App. Div. 1990)
..... 11

Deutsche Bank v. Dill,
903 N.E.2d 166 (Ind. Ct. App. 2009) 21

English v. Gen. Elec. Co.,
496 U.S. 72 (1990) 14

First Am. Title Ins. Co. v. United States,
848 F.2d 969 (9th Cir. 1988) 3, 17

Haye v. United States,
461 F. Supp. 1168 (C.D. Cal. 1978) 9

Kivel v. United States,
878 F.2d 301 (9th Cir. 1989) 8

Cited Authorities

Page

Miami-Dade County v. Imagine Properties, Inc., 752 So.2d 129 (Fla. Dist. Ct. App. 2000) 11

Miles v. Stehle, 36 N.W. 142 (Neb. 1888) 11

Richter's Loan Co. v. United States, 235 F.2d 753 (5th Cir. 1956) 9

Russell v. United States, 551 F.3d 1174 (10th Cir. 2008) ..... *passim*

Tompkins v. United States, 946 F.2d 817 (11th Cir. 1991) 3

Tompkins v. United States, 946 F.2d 969 (11th Cir. 1991) 17, 19

Union Nat'l Bank of Columbia v. Cook, 110 S.C. 99, 96 S.E. 484 (1918) 12

United States v. Brosnan, 363 U.S. 237 (1960) 3

United States v. Polk, 822 F.2d 871 (9th Cir. 1987) 8-9

United States v. Sirico, 247 F. Supp. 421 (S.D.N.Y. 1965) 9

Cited Authorities

Page

STATUTES

11 U.S.C. § 548(d)(2)(a) 13

Colo. Rev. Stat. § 38-38-501 ..... 9, 15

Colo. Rev. Stat. § 38-38-506 9

I.R.C. § 7425 (2006) ..... *passim*

I.R.C. § 7425(b)(1) (2006) 2

I.R.C. § 7425(d) (2006) 15

N.Y. RPAPL § 1352 11

Or. Rev. Stat. § 312.150 11

Wyo. Stat. Ann. § 1-18-114 11

LEGISLATIVE MATERIALS

S. Rep. No. 1708 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3722 14

Cited Authorities

Page

TREATISES, BOOKS, AND ARTICLES

Internal Revenue Service Data Book 2008 (2008) 20

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 19

George M. Platt, *The Dracula Mortgage: Creature of the Omitted Junior Lienholder*, 67 Or. L. Rev. 287 (1988) 16

Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* (5th ed. 2007) 6, 10, 16

Jack Healy, *More Homeowners Facing Foreclosure*, N.Y. Times, May 29, 2009 20

Jim Wasserman, *Troubled homeowners get a break from IRS*, Sacramento Bee, Dec. 17, 2008 21

Josh Brown, *IRS initiative aims to help people sell homes*, Virginian-Pilot & Ledger Stat (Norfolk VA), Dec. 17, 2008 20

Restatement (Third) of Property: Mortgages § 7.1 (1997) ..... *passim*

Cited Authorities

Page

Robert H. Bomar, *Mortgage Foreclosure in New York: Omitted Lienors*, 22 Real Prop. Prob. & Tr. J. 509 (1987) 10

Sheryl Gay Stolberg & Edmund L. Andrews, *$275 Billion Plan Seeks to Address Housing Crisis*, N.Y. Times, Feb. 19, 2009 17

INTEREST OF THE *AMICUS CURIAE*

The American Land Title Association ("ALTA") is the national trade association of the land title industry. ALTA has approximately 3,000 members, including land title insurers, title insurance agents, abstracters, and associate members, that do business in almost all counties throughout the United States.[1]

ALTA's interest in this case arises from the common interest of its members and their insureds in the clarity, certainty, and predictability of laws affecting title to and rights in real estate. Confusion in those rules leads to claims, litigation, and uncertainty for both title insurers and those who hold interests in real estate. Ultimately, such uncertainty creates impediments to the free transfer of property and the healthy functioning of real estate markets, with the consequence of potentially lower real estate values and reduced liquidity for all.

---

[1] The parties have consented to the filing of this *Amicus Curiae* brief. The consent letter of the United States has been filed with the Clerk. On May 26, 2009, petitioners' counsel filed their consent to the filing of *amicus* briefs in support of either party. Counsel of record for all parties received notice at least 10 days prior to the due date of ALTA"s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the ALTA made a monetary contribution to its preparation or submission. First American Title Insurance Company, which has insured the petitioners' interest in the property at issue, is paying the cost of the petition. That company is a member of ALTA.

The Tenth Circuit's decision below, *Russell v. United States*, 551 F.3d 1174 (10th Cir. 2008), threatens to create significant uncertainty about the viability of state law remedies provided to purchasers at foreclosure sales, and subsequent purchasers from them, in the event that, through inadvertence, the Internal Revenue Service ("IRS") fails to receive notice of the foreclosure sale when it has a tax lien on the property. As a consequence of the current downturn in the economy, the number of foreclosure sales is, unfortunately, extraordinarily high. Similarly, the number of IRS tax liens has increased dramatically in recent years. At present, there are more than one million federal tax liens outstanding. Thus, the potential that state law remedies available to address and remedy omitted IRS liens will be preempted has widespread implications of concern to ALTA and its members.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For a number of reasons, junior lienholders, such as the IRS, sometimes do not receive notice of a foreclosure proceeding. Most states provide that the foreclosure sale has no effect in extinguishing the lien of a party who does not receive notice (referred to as an "omitted party"). Regardless, Federal law establishes that in *all* states, if the IRS fails to receive notice of a foreclosure sale, the sale is "made subject to and without disturbing" the IRS lien. I.R.C. § 7425(b)(1) (2006).

A great many states, like Colorado in this case, provide post-sale statutory or equitable remedies to enable the owner of the foreclosed property to "quiet

the title" against such omitted parties by placing the junior lienholder in essentially the same position it would have been in if it had received notice. These remedies have historically been enforceable in situations when the IRS is the omitted junior lienholder. *See Tompkins v. United States*, 946 F.2d 969 (11th Cir. 1991); *First Am. Title Ins. Co. v. United States*, 848 F.2d 969 (9th Cir. 1988). This is consistent with the instruction in *United States v. Brosnan*, 363 U.S. 237 (1960), that, while matters affecting federal tax liens are matters of federal law, state law governing the divestiture of federal tax liens should be adopted as federal law, except to the extent that Congress may have entered the field.

The Tenth Circuit's decision in this case directly precludes one of those remedies from being applied to an omitted IRS lien. That remedy—requiring the IRS to exercise its right of redemption within a court-ordered period or have that right extinguished against the property in the hands of the new owner—is provided by statute or common law not only in Colorado, but in a number of other states including New York and New Jersey. The Tenth Circuit's holding was not compelled by the applicable federal statute. The court concluded that I.R.C. § 7425 "'occup[ies] the field'," 551 F.2d at 1180, leaving no room for such state remedies to correct the failure to give notice to the IRS, even though I.R.C. § 7425 was intended only to ensure that an IRS lien could not be extinguished by a state foreclosure proceeding of which the IRS had no notice.

If the Tenth Circuit's conclusion is not reversed by this Court, remedies that numerous states have provided to innocent purchasers of foreclosure

properties would be placed in jeopardy or in doubt when the IRS is an omitted party. Such remedies play an important role in state foreclosure law. They ensure that omitted parties, after being given proper notice, are afforded a fair opportunity to exercise their rights so that such liens do not become a long-lasting cloud on the titles of innocent purchasers.

This Court has been vigilant in protecting the state foreclosure process from destabilizing misinterpretations of federal law. *See, e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). The Tenth Circuit's decision here creates such a problem, displacing state law without clear federal authorization and providing the IRS with an unintended windfall when it does not receive notice of a foreclosure sale. The decision threatens an "essential state interest" in the "'security of titles to real estate'" by placing a "federally created cloud" on such titles. *Id.* at 544 (citation omitted). At this time of rising foreclosures and skyrocketing federal tax liens, this Court should grant review to protect the security of real estate titles arising from foreclosure proceedings.

ARGUMENT

I. POST-FORECLOSURE REMEDIES TO ADDRESS OMITTED IRS LIENS ARE NECESSARY TO ASSURE CLEAR TITLES.

A. A Major Purpose Of Foreclosure Is To Enable Properties Encumbered With Liens To Be Sold With Clear Titles.

To understand the potential impact of the *Russell* decision, it is important to understand the foreclosure process, the problems that arise when a junior lienholder does not receive notice of the foreclosure, and how the various states have attempted to address those problems in a way that is fair and equitable to both the innocent purchaser of the foreclosed property[2] and the omitted junior lienholder.

The foreclosure process serves two distinct purposes. It enables persons holding liens on the property, most often a mortgage lender who holds the senior lien, to recover some of its investment by selling the secured property when the loan is in default. It also enables properties that have been burdened with liens by unpaid creditors to be sold to buyers with the titles unburdened by such liens.

---

[2] The Russells, the petitioners in this case, are consumers who purchased their home from the foreclosure sale purchaser, the mortgage lender who had instituted the foreclosure proceeding to which the IRS had not received notice. For ease of reference, "foreclosure sale purchaser" as used hereafter includes any subsequent *bona fide* purchaser for value of the foreclosed property.

> It is a fundamental principle of mortgage law that a valid judicial foreclosure of a senior mortgage terminates not only the owner's title and equitable redemption rights, but also all other junior interests whose holders were made parties defendant. A power of sale (nonjudicial) foreclosure that complies with applicable statutory notice and related requirements accomplishes the same result. Thus, a purchaser at a foreclosure sale not only acquires the previous owner's interests in the real estate, but a title free and clear of all other properly joined interests that were junior to the foreclosed lien.

Restatement (Third) of Property: Mortgages § 7.1 cmt. (a) (1997).

B. For Various Reasons Junior Lienholders May Not Receive Notice Of The Foreclosure Sale.

In most states, if a party with a lien on the property is omitted from the foreclosure process, the foreclosure does not affect its lien. Restatement (Third) of Property: Mortgages § 7.1, cmt (b) (1997); Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* 823, 824 (5th ed. 2007) (citing cases). Such omissions are not infrequent, and generally occur without any fault on the part of the foreclosing lender or the foreclosure sale purchaser.

There are many reasons why junior lienholders may not be identified and provided notice of the foreclosure sale. Determining who should be provided notice is based on a search of land records maintained by

approximately 3400 county and local record offices across the nation. This search is generally undertaken by a title company or independent searcher. Today, land records are generally maintained as automated databases. Utilization of these databases requires the use of an index or indices that make records accessible by referring the researcher to the names of parties, recording information (book, page, or instrument numbers), property description (lot and block, and/or tax identifying numbers), and some description of the recorded instrument. Since no document format has garnered general acceptance, there are significant variations in the format, creation and maintenance of county and local land records.

Whether the search is undertaken the old-fashioned way through a search of dusty stacks of grantor-grantee title books, or is undertaken with the assistance of modern computer databases, the possibility of a misfiling or of human error in overlooking a lien may derail even the most conscientious search.

The risk of an error is increased in the case of federal tax liens because such liens are filed against the taxpayer in a county records center indexed by the name of the taxpayer, rather than being filed in a grantor-grantee index or other file that contains information about a specific parcel of property. Tax liens are created by the IRS recording a "Notice of Federal Tax Lien." This document recites the name of the taxpayer, his or her social security number, and street address. By federal statute, the federal tax lien attaches to all real property owned by the taxpayer in the county where it is recorded, even though the Notice itself does not

identify any specific property owned by the taxpayer. Connecting the IRS lien against an individual to property that might be owned by that individual requires a title searcher to tie this limited information in the IRS Notice filed in a general index (organized according to names) to the owner of particular properties that will be found in the grantor-grantee index or in some other index organized by the legal description of the property.

The complexity of the title searcher's task to link names on IRS liens with names in property records is exacerbated by the variety of names that people may use or how their name may be transcribed by others. Omitted middle initials, the use of an "Americanized" name, use of a nickname, or a switch from a maiden to a married name, can result in the most conscientious searcher overlooking a valid lien. Moreover, there is the ever-present problem of common or ethnic names. Searches for common names such as John Smith or Robert Johnson can generate a flood of records of properties owned by a person other than the taxpayer. Ascertaining the applicability of a particular lien to a property, particularly in a populous county with many similar ethnic names (such as Ramirez, or Nguyen, or Park), is a complex and inexact science that may be like the proverbial search for a needle in the haystack. Case law is replete with real-life examples of searches derailed by variations in names.[3]

---

[3] *See e.g.*, *Kivel v. United States*, 878 F.2d 301 (9th Cir. 1989) (lien notice against "Bobbie Morgan" where property was held by "Bobbie Morgan Lane"); *United States v. Polk*, 822 F.2d 871 (Cont'd)

In recognition of the reality that not all junior lienholders may be identified and given notice of a foreclosure, the states have developed various mechanisms, whether under their common law or by statute, to enable an innocent foreclosure purchaser, or a subsequent purchaser, to clear (or "quiet") the title against a junior lienholder omitted from the foreclosure process. The Colorado statute at issue in this case, Colo. Rev. Stat. §§ 38-38-501 and 38-38-506, provides one example of post-foreclosure sale remedies available across the nation for the innocent purchaser.

C. States Have Developed Various Mechanisms For Preventing Omitted Parties From Clouding The Titles For Unduly Long Periods.

Remedies are necessary for the innocent foreclosure sale purchaser because omitted parties can take actions that threaten the purchaser's title to and enjoyment of the property.

Depending on the state, omitted junior lienholders generally have two options in the wake of a foreclosure

---

(Cont'd)

(9th Cir. 1987) (lien notice named "Roy Bruce Polk" but property was listed for "Bruce Polk"); *Richter's Loan Co. v. United States*, 235 F.2d 753 (5th Cir. 1956) (lien against "Freidlander" instead of "Friendlander"); *Brightwell v. United States*, 805 F. Supp. 1464, 1466-67 (S.D. Ind. 1992) (IRS lien named "William S. Van Horn" rather than "William B. VanHorn"); *Haye v. United States*, 461 F. Supp. 1168, 1169 (C.D. Cal. 1978) (lien for "Manual de J. Castello" when correct name was "Maneul J. de Castillo"); *United States v. Sirico*, 247 F. Supp. 421, 422 (S.D.N.Y. 1965) (lien against "George and A. Sirico" where title documents listed "Assunta Sirico" as property owner).

sale for which they were not given notice. First, they can foreclose on their own liens, which, as noted above, remain valid. Alternatively, they can seek to exercise their right of redemption by tendering to the foreclosure purchaser "the obligation that was owed on the senior mortgage at the time of its foreclosure." Restatement (Third) of Property: Mortgages § 7.1, at 452 (1997); *see also* Nelson & Whitman, *supra*, at 825 (citing cases); Robert H. Bomar, *Mortgage Foreclosure in New York: Omitted Lienors*, 22 Real Prop. Prob. & Tr. J. 509 (1987).

Since there may be no time limit on the exercise of these rights, such omitted liens can be very disruptive to the settled expectations of the foreclosure sale purchaser and create a serious cloud on the title.

To ameliorate this problem, states have developed statutory or common law mechanisms that enable the foreclosure sale purchaser to take steps to require the omitted junior lienholder to exercise the same or similar rights that it would have had if it had received notice of the original foreclosure, or have that junior lien extinguished as against the new, innocent landowner.[4]

One mechanism is for the foreclosure sale purchaser to institute re-foreclosure proceedings after giving notice to the junior lienholder who was omitted from the first foreclosure proceeding. *See* Nelson & Whitman, *supra*, at 829 (citing cases). Some states, such as

---

[4] Of course, the IRS's claim for back taxes is still valid against the original landowner who failed to pay the taxes, and properly filed IRS liens remain valid against any other property owned by that person.

Colorado, also permit the foreclosure sale purchaser to require that, within a court-determined period of time, the omitted lienholder exercise the right of redemption it would have had prior to the original foreclosure proceeding to pay off the senior lien and obtain title to the property. *Id.* at 830.[5] Such procedures are sometimes referred to as "strict foreclosure" in that the rights of the omitted party will be foreclosed if it does not exercise its redemption rights without the necessity for holding a public sale (as would take place in the case of judicial or nonjudicial foreclosure sales). Such procedures effectively give the IRS (or any omitted junior lienholder) the right to take the property if its value exceeds that of the senior lien paid off in the foreclosure.

Several other states, including, New York, Oregon, and Wyoming, have enacted "strict foreclosure" statutes like the Colorado statute.[6] Other states, such as Florida, Nebraska, New Jersey, and South Carolina make similar procedures available as a matter of equity under their common law. *See, e.g., Miami-Dade County v. Imagine Properties, Inc.*, 752 So.2d 129 (Fla. Dist. Ct. App. 2000); *Miles v. Stehle*, 36 N.W. 142 (Neb. 1888); *Citicorp Mtge.*

---

[5] Prior to a foreclosure sale, a junior lienholder has an equitable right to "redeem" the lien of the senior foreclosing lender and thus to preserve its ability to enforce both its own lien and the senior lien it will acquire. The foreclosure sale generally cuts off that right of redemption if the junior lienholder received notice of the sale. *See* Restatement (Third) of Property: Mortgages § 7.1. at 452.

[6] N.Y. Real Prop. Acts. and Proc. Law (RPAPL) § 1352 (2009); Or. Rev. Stat. § 312.150; Wyo. Stat. Ann. § 1-18-114.

Inc., v. Pessin, 570 A.2d 481 (N.J. Super. Ct. App. Div. 1990); *Union Nat'l Bank of Columbia v. Cook*, 110 S.C. 99, 96 S.E. 484 (1918).

These procedures give the omitted junior holder, here the IRS, the same rights that would have been available to it in the original foreclosure, specifically notice and the opportunity to redeem. But by placing a time limit for the omitted party to exercise that right, the Colorado statute enabled the Russells to obtain clear title free of that lien if the IRS elected not to redeem within the time established by the court.

II. THE TENTH CIRCUIT'S DECISION THREATENS ALL STATE POST-FORECLOSURE REMEDIES AFFECTING OMITTED IRS LIENS.

The Tenth Circuit held that Colorado's post-foreclosure procedure was preempted because federal law said that a foreclosure sale without notice to the IRS does not eliminate the IRS lien. This threatens vital state interests in post-foreclosure sale remedies without clear authorization from Congress.

A. The Tenth Circuit's Decision Conflicts With This Court's Admonition As To The Clarity With Which Congress Must Speak Before State Laws Affecting Foreclosures Will Be Preempted.

This Court has recognized that states have a vital interest in an effective foreclosure process. The alternative is to place "every piece of realty purchased

at a foreclosure . . . under a federally created cloud." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). In *BFP*, this Court considered whether a foreclosure sale conducted in compliance with California law should be set aside under a provision of the bankruptcy law, 11 U.S.C. § 548(d)(2)(a) (2006), as being for less than its "'reasonab[le] equivalent value'." 511 U.S. at 534-36. In affirming the sale, this Court traced the history of modern foreclosure law to the courts of chancery in England, whose enthusiasm for the borrower's "'equity of redemption'" "left lenders in a quandary, since title to forfeited property could remain clouded for years after law day [the original due date]." *Id.* at 541.

"To meet this problem, courts created the equitable remedy of foreclosure: after a certain date, the borrower would be forever foreclosed from exercising his equity of redemption." *Id.* In the years since, the "States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the needs of lenders and borrowers." *Id.* at 541-42. In determining whether to set the *BFP* sale aside, the Court noted that the sale comported with state foreclosure law, and that to set it aside would superimpose an additional layer of federal requirements. *Id.* at 542-43.

While Congress has the power to modify or abrogate state law, the Court would not "presume such a radical departure" in the absence of clear textual guidance. *Id.* at 543. "Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its

effect." *Id.* at 539. To displace traditional State regulation in this area, the federal statutory purpose must be "'clear and manifest'," *Id.* at 544 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

In this case, the Tenth Circuit did not identify anything in the language or legislative history of I.R.C. § 7425 manifesting clear congressional intent to displace state law equitable principles or remedies provided to foreclosure sale purchasers to remedy the consequences of an omitted IRS lien. It relied solely on legislative history fragments indicating that the government must receive notice before its lien can be extinguished. *Russell*, 551 F.3d at 1180. That proposition is unexceptional, and the legislative history relied upon by the court below does not rise to the level of the *BFP/General Electric* requirement that the federal statutory intent to displace state laws in this area must be "clear and manifest."

In relying on a small excerpt of legislative history to displace a considerable body state law, the Tenth Circuit ignored the limited purpose of the statute: to give "the Government an opportunity to review its position and determine the appropriate action without placing an undue burden on a foreclosing creditor." S. Rep. No. 89-1708 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3722, 3748. The Report makes clear that I.R.C. § 7425 was aimed at the situation "where the interests of junior lienors may be eliminated without notice" because in that scenario "the interests of the Government are not presently sufficiently protected." *Id.* at 3748.

But that was not the situation in *Russell*. The IRS was entitled to both notice and the opportunity to protect its interest. The Colorado statute specifically requires notice to the IRS and the opportunity for it to redeem prior to the extinguishment of its lien against the innocent purchaser. *See* Colo. Rev. Stat. § 38-38-501. And federal law recognizes redemption as a means of resolving omitted IRS liens. *See* I.R.C. § 7425(d).

B. The Tenth Circuit's Decision Threatens To Undermine All State Law Mechanisms For Addressing Omitted IRS Liens.

Even though I.R.C. § 7425 says only that a tax lien cannot be extinguished if the IRS does not receive notice of the foreclosure sale, the court below reasoned that Colorado's post-sale remedy of providing the IRS with an opportunity to redeem or risk the loss of its lien against the property was in conflict with Congress's occupation of the field. *Russell*, 551 F.3d at 1180. This holding threatens all state strict foreclosure remedies as applied to IRS liens, whether such remedies are created by statute or by the common law. *See* discussion *supra*, at 10-12. That, in itself, would justify the Court's granting review. However, the broad basis on which the court found preemption—occupation of the field—potentially places in jeopardy other state law mechanisms that are provided to remedy or mitigate the potentially inequitable consequences of the IRS being able to assert lien rights against an innocent purchaser.

Thus, for example, if the *Russell* decision is good law, state laws (both statutory and under the common

law) that permit a foreclosure sale purchaser to cure the problem of an omitted party by re-foreclosing after giving notice to the omitted party could be argued to be preempted as against the IRS.

But the potential problems are even greater. There is a common principle that underlies all state law remedies provided to foreclosure sale purchasers when an omitted party seeks to take advantage of the lack of notice to assert its lien against those purchasers. That principle is that the lien of the foreclosing senior lienor (typically the mortgage lender)—normally merged into the fee as a result of the foreclosure sale—will be revived so that it can be asserted against the omitted junior lienholder by the foreclosure sale purchaser. *See* Nelson & Whitman, *supra*, § 7.15 at 825-28; George M. Platt, *The Dracula Mortgage: Creature of the Omitted Junior Lienholder*, 67 Or. L. Rev. 287 (1988).[7]

The fundamental unfairness that this principle seeks to remedy is easy to appreciate. Assume a property with a $300,000 senior mortgage lien and a $100,000 tax lien, is sold at foreclosure for $250,000. If the IRS had been given notice of the sale, it would not have recovered

---

[7] Prof. Platt's article is both entertaining and instructive. He refers to the senior mortgage lien that is revived when an omitted junior lienholder seeks to assert its claim against an innocent foreclosure sale purchaser as a "Dracula lien." That lien is "dead" if there are no omitted junior lienholders in the foreclosure sale, but it becomes "alive" with respect to any omitted junior lienholder and may be asserted by the new owner so as to prevent the omitted junior lienholder from benefiting unreasonably from the fact it was omitted from the original foreclosure.

anything on its lien because the value of the property was "under water" with regard to the amount of the senior mortgage lien.[8] In these circumstances, it would be highly inequitable for the IRS to be able to take advantage of the fact that it did not receive notice of the foreclosure sale to seek to enforce its lien against the innocent purchaser of the foreclosed property as if it now had a first lien on the property. The equitable principle of allowing the innocent purchaser to take advantage of the revived senior lien is intended to ensure that the IRS does not obtain a greater economic benefit by not having received notice than if it had received notice.

This state law principle—which underlies Colorado's statute—also underlies the remedy provided under the laws of most states when the IRS asserts its omitted tax lien against the purchaser out of the foreclosure: that the innocent purchaser can assert the rights of lienors who were senior to the omitted junior lienholder. Other federal appellate courts have concluded that such post-foreclosure sale state law remedies are not preempted as against an omitted IRS lien. *See Tompkins v. United States*, 946 F.2d 817 (11th Cir. 1991); *First Am. Title Ins. Co. v. United States*, 848 F.2d 969

---

[8] With the decline in real estate values in recent years, a great many homeowners across the country are "under water" in this regard. *See* Sheryl Gay Stolberg & Edmund L. Andrews, *$275 Billion Plan Seeks to Address Housing Crisis*, N.Y. Times, Feb. 19, 2009, at A1. As a consequence, the value of such properties is not high enough to even cover the amount of the senior mortgage lien, much less provide any prospect that the sale of the property, at foreclosure or otherwise, would yield enough to pay off all or part of the IRS's junior tax lien.

(9th Cir. 1988). Thus, the Tenth Circuit's decision here creates a clear conflict with those decisions.

C. The Tenth Circuit's Decision Provides An Inequitable Advantage To The IRS While Significantly Undermining State Law Remedies Without Explicit Statutory Direction.

The practical effects of the *Russell* holding are perverse. An innocent failure to provide pre-foreclosure notice to the IRS puts the government in a *better* position than if it had actually received notice under the provisions of I.R.C. § 7425, because it now has a lien that may be impossible to extinguish without being paid off. This omission also enables the IRS to proceed against wholly innocent parties, such as the Russells, who are complete strangers to the original tax controversy and to the foreclosure itself. Moreover, such innocent parties would not appear to be allowed to take advantage of state laws that permit them to assert the revived rights of the former senior lienholders against the IRS. By any measure, *Russell* gives the government a confiscatory windfall far beyond the limited purpose intended by Congress: ensuring the IRS was notified prior to a foreclosure proceeding that extinguished its interests.

The sweeping nature of the *Russell* holding is particularly problematic because

> Federal statutes impinging upon important state interests 'cannot . . . be construed without regard to the implications of our dual

> system of government. . . . [W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise, and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.'

BFP, 511 U.S. at 544 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-40 (1947) (alteration in original)).

This Court has emphasized that the marketability of titles and orderly administration of foreclosure processes reflect a vital state interest: "It is beyond question that an essential state interest is at issue here." *BFP*, 511 U.S. at 544 (citing *Am. Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911)). The Court reiterated its prior observations that "'the general welfare of society is involved in the security of the titles to real estate,'" and the power to ensure that security "'inheres in the very nature of [state] government.'" *Id.* (citation omitted) (alteration in original).

Russell's expansive holding that "it is clear Congress intended federal law to 'occupy the field' in revolving such federal tax lien issues," 551 F.3d at 1180, is not only squarely at odds with *Tompkins* and *First American*, but also jeopardizes virtually every state foreclosure remedy that seeks to address the problem of an omitted IRS lien.

III. REVIEW IS NEEDED TO PREVENT ADVERSE EFFECTS ON REAL ESTATE MARKETS.

As a consequence of the current global economic downturn, the number of transactions that may be affected by the *Russell* decision is far greater now than at any other time in recent memory. The annual number of federal tax liens filed has skyrocketed from 167,867 in 1999 to 768,168 in 2008. *Internal Revenue Service Data Book 2008*, at 41 (2008). The federal government has more than a million tax liens outstanding at this time. Josh Brown, *IRS initiative aims to help people sell homes*, Virginian-Pilot & Ledger Stat (Norfolk VA), Dec. 17, 2008, at 3.

Likewise, the number of foreclosures has, unfortunately, skyrocketed. According to the Mortgage Bankers Association, nearly 5.4 million (or 12%) of the country's 45 million home loans were delinquent or in some stage of the foreclosure process in the first three months of 2009. Jack Healy, *More Homeowners Facing Foreclosure*, N.Y. Times, May 29, 2009, at B5. With a million outstanding federal tax liens, a significant portion of foreclosures will involve tax issues, since families struggling to pay their mortgages will also frequently be delinquent in their tax obligations.

Foreclosure sales, while distressing because of the adverse impact on the owners who were unable to pay their mortgages, are important for the healthy functioning of real estate markets. That is why states enact statutes "aimed at enhancing the finality of power of sale foreclosure and the marketability of titles it

produces." Restatement (Third) of Property: Mortgages § 7.1, at 457. Even the IRS has acknowledged that its million plus liens are deterring potential buyers from bidding on foreclosed homes. Jim Wasserman, *Troubled homeowners get a break from IRS*, Sacramento Bee, Dec. 17, 2008, at B9.

Russell compounds the problems for innocent foreclosure sale purchasers at a terrible time for the American economy. Not only does a completely innocent purchaser at a foreclosure sale face the risk of being subjected to the overlooked tax lien, but, upon discovering that lien, *Russell* leaves the purchaser with few, if any, options otherwise available under state law. Attempting to extinguish the lien by doing precisely what I.R.C. § 7425 sought to induce him to do—notifying the IRS and offering it the opportunity to redeem—is impermissible under *Russell*. The purchaser will be condemned to carry the lien against the property unless he is willing to pay the IRS a debt he did not incur and of which he was unaware when he purchased the property.[9] This can only result in deterring potential buyers from being willing to purchase properties out of foreclosure.

---

[9] The ultimate burden will be borne by innocent property purchasers even though certain courts are inclined to believe insurers will absorb the loss. *See e.g.*, *Deutsche Bank v. Dill*, 903 N.E.2d 166, 170-71 n.4 (Ind. Ct. App. 2009). Many properties purchased out of foreclosure are not covered by title insurance. Moreover, title insurers typically react to such pervasive problems by taking exceptions to the coverage of such risks. *See BFP*, 511 U.S. at 544 ("Already, title insurers have reacted to the [pre-*BFP*] rule by including specially crafted exceptions from coverage in many policies issues for properties purchased at foreclosure sales.").

In *BFP*, this Court cautioned against interpretations of federal law that would place a "federally created cloud" over real estate titles and thus undermine an essential state interest. 511 U.S. at 544. The decision below does precisely that.

CONCLUSION

For the reasons discussed above and in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

SHELDON E. HOCHBERG
Counsel of Record
CHARLES G. COLE
SAAD GUL
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Amicus Curiae
American Land Title Association